

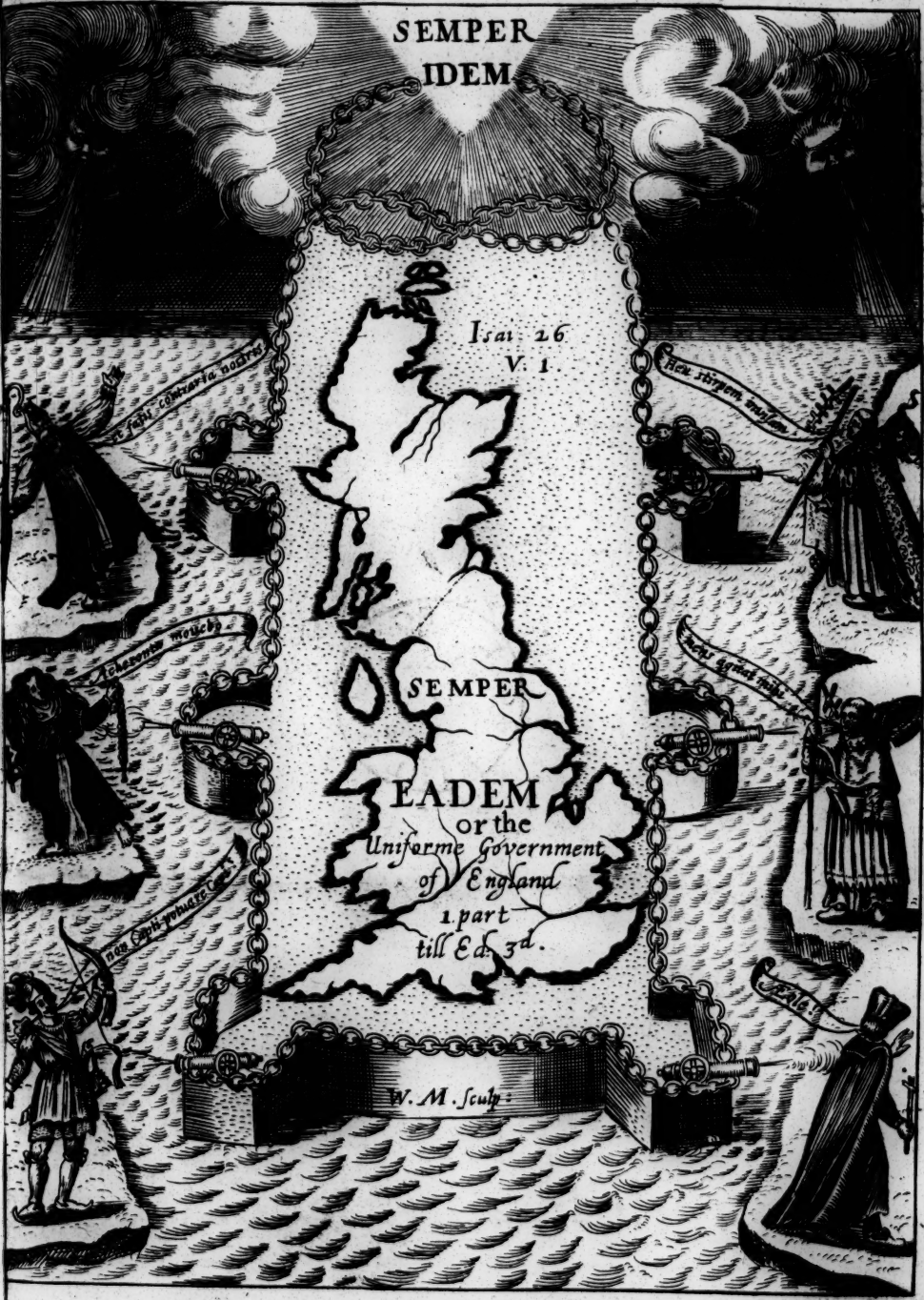
SEMPER
IDEM

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SEMPER

EADEM
or the
Uniforme Government
of England
1. part
till E. 3d.

W. M. Sculp.



Pr. 23. Labl



AN
HISTORICALL
DISCOURSE
OF THE
UNIFORMITY OF THE
GOVERNMENT
OF
ENGLAND
THE FIRST PART.

From the first Times till the
Reigne of
Edward the third.

LONDON,
Printed for *Matthew Walbanke* at Grayes-
Inne-Gate. 1647.





TO THE
RIGHT HONOURABLE
EDWARD

Earle of Manchester,
Speaker of the House of Peeres:

AND
THE HONOURABLE
WILLIAM LENTHALL, Esq.

Speaker of the House of Commons
In PARLIAMENT.

M *Ay it please You to accept of
this Sacrifice which I offer be-
fore Your Supream Fudica-
tory to the service of the times.*

The fire is that of loyalty, neither wilde

A 3

nor

The Epistle Dedicatory.

*nor common; nor is the thing altogether
forbidden and unclean. I confesse its
maimed and unworthy, yet its the best
that I have; and in that regard whiles I
now stand at Your Barre, if You shall
please to dismisse me without kneeling, I
shall in that posture doe the Houses the best
service that I can elsewhere.*

NATH. BACON.

To

To Consideration.



Private debate concerning the right of an English King to Arbitrary rule over English Subjects as Successor to the Norman Conquerour, (so called) first occasioned this Discourse. Herein I have necessarily fallen upon the Antiquity and Uniformity of the Government of this Nation: It being cleared may also serve as an Idea for them to consider, who doe mind the restitution of this shattered frame of policy. For as in all other cures, so in that of a distempered government the originall constitution of the body is not lightly to be regarded; and the contemplation of the proportion of the Manner of the Nation in a small modell brings no lesse furtherance to the right apprehension of the true nature thereof (besides the delight) then the perusing of a Map doth to the traveller after a long and tedious travaile.

I propound not this Discourse as a pattern drawn up to the life of the thing, nor the thing it selfe as a Masterpiece for future ages; for well I doe know, that Common-weales in their minority doe want not onely perfection of strength and beauty, but also of parts and proportion; especially seeing that
their

their full age attaineth no further growth then to a mixture of divers formes in one. Ambition hath done much by discourse and action to bring forth Monarchy out of the wombe of notion, but yet like that of the Philosophers stone the issue is but wind, and the end misery to the undertakers: and therefore more then probable it is that the utmost perfection of this nether worlds best government consists in the upholding of a due proportion of severall interests compounded into one temperature.

He that knoweth the secrets of all mens hearts, doth know that my aime in this Discourse is neither at Scepter or Crozier, nor after popular dotage, but that Justice and Truth may moderate in all. This is a Vessell I confesse ill and weakly built, yet doth it adventure into the vast Ocean of your censures, Gentlemen, who are Antiquaries, Lawyers, and Historians, any one of whom might have steered in this course much better then my selfe. Had my owne credit been the fraite, I must have expected nothing lesse then wracke and losse of all; but the maine propose of this voyage being for discovery of the true nature of this government to common view; I shall ever account your just censures, and contradictions (especially published with their grounds) to be my most happy returne, and as a Crown to this worke. And that my labour hath its full reward, if others taking advantage by mine imperfections shal beautifie *England* with a more perfect and lively character.

The

The Contents.

| | |
|--|-------|
| C hap. 1. <i>Of the Britons, and their government</i> | P. 1 |
| Chap. 2. <i>Concerning the conversion of the Britons unto the faith</i> | P. 3 |
| Chap. 3. <i>Of the entry of the Romans into Britaine, and the state thereof during their continuance</i> | P. 5 |
| Chap. 4. <i>Of the entry of the Saxons, and their manner of government</i> | P. 12 |
| Chap. 5. <i>Of Austins comming to the Saxons in England, his entertainment and worke</i> | P. 17 |
| Chap. 6. <i>Of the imbedding of Prelacy into the government of this Kingdome</i> | P. 21 |
| Chap. 7. <i>Of Metropolitans in the Saxons time</i> | P. 23 |
| Chap. 8. <i>Of the Saxon Bishops</i> | P. 25 |
| Chap. 9. <i>Of the Saxon Presbyters</i> | P. 27 |
| Chap. 10. <i>Of inferiour Church-officers amongst the Saxons</i> | P. 28 |
| Chap. 11. <i>Of Church-mens maintenace amongst the Saxons</i> | P. 29 |
| Chap. 12. <i>Of the severall precincts or jurisdictions of Church-governours amongst the Saxons</i> | P. 35 |
| Chap. 13. <i>Of the manner of the Prelates government of the Saxon Church</i> | P. 36 |
| Chap. 14. <i>Of causes Ecclesiasticall</i> | P. 39 |
| Chap. 15. <i>A briefe censure of the Saxon Prelaticall Church government</i> | P. 43 |
| Chap. 16. <i>Of the Saxons Common-weale, and the government thereof, and first of the King</i> | P. 46 |
| Chap. 17. <i>Of the Saxon Nobility</i> | P. 53 |
| Chap. 18. <i>Of the Freemen amongst the Saxons</i> | P. 55 |
| Chap. 19. <i>Of the villains amongst the Saxons</i> | P. 56 |
| B | Chap. |

The Contents.

| | |
|--|--------|
| Chap. 20. Of the grand Councell amongst the Saxons called the Micklemote | p. 57 |
| Chap. 21. Of the Councell of Lords | p. 62 |
| Chap. 22. Of the manner of the Saxon government in the time of warre | p. 63 |
| Chap. 23. Of the government of the Saxon Kingdome in the times of peace, and first of the division of the King- dome into shires, and their officers | p. 65 |
| Chap. 24. Of the County court, and Sheriffs Torne | p. 66 |
| Chap. 25. Of the division of the County into Hundreds, and the Officers and Court thereto belonging | p. 68 |
| Chap. 26. Of the division of the Hundreds into Decen- naries | p. 70 |
| Chap. 27. Of Franchises, and first of the Church Fran- chise | p. 71 |
| Chap. 28. Of the second franchise called the Marches | p. 71 |
| Chap. 29. Of County Palatines | p. 73 |
| Chap. 30. Of Franchises of the person | ibid. |
| Chap. 31. Of Mannors | p. 75 |
| Ch. 32. Of Courts incident & united unto Mannors | p. 77 |
| Chap. 33. Of Townships, and their Markets | p. 79 |
| Chap. 34. Of the Forrests | p. 82 |
| Chap. 35. Concerning Iudges in Courts of justice | p. 84 |
| Chap. 36. Of the proceedings in judicature by Indict- ment, Appeale, Presentment, and Action | p. 85 |
| Chap. 37. Of the severall manners of extraordinary triall by Torture, Ordeale, Compurgators, and Battaile | p. 88 |
| Chap. 38. Of the ordinary manner of triall amongst the Saxons by Inquest | p. 91 |
| Chap. 39. Of passing judgement and execution | p. 94 |
| Chap. 40. Of the penall Laws amongst the Saxons | p. 96 |
| Chap. 41. Of the Laws of property of Lands and Goods, and the manner of their conveyance | p. 102 |
| Chap | |

The Contents.

| | |
|---|-------|
| Chap.42. Of the times of Law and vacancy | p.110 |
| Chap.43. An Epilogue to the Saxon government | p.111 |
| C hap.44. Of the Norman entrance | p.113 |
| Chap.45. Of the title of the Norman Kings to the English crowne; that it was by election | p.115 |
| Chap.46. That the government of the Normans proceeded upon the Saxon principles, And first of Parliaments | p.120 |
| Chap.47. Of the Franchise of the Church in the Norman times | p.123 |
| Chap.48. Of the severall subservient jurisdictions, by Marches, Counties, Hundreds, Burroughs, Lordships, and Decennaries | p.131 |
| Chap.49. Of the immunities of the Saxon free men under the Norman government | p.135 |
| Chap.50. Recollection of certain Norman Laws concerning the Crown, in relation to those of the Saxons formerly mentioned | p.138 |
| Chap.51. Of the like Lawes that concerne common interest of goods | p.142 |
| Chap.52. Of Laws that concerne common interest of Lands | p.144 |
| Chap.53. Of divers Laws made concerning the execution of justice | p.150 |
| Chap.54. Of the Militia during the Normans time | p.152 |
| Chap.55. That the entry of the Normans into this government could not be by Conquest | p.155 |
| Chap.56. A briefe survey of the sence of Writers concerning the point of conquest | p.158 |
| C hap.57. Of the government during the Reignes of Steven, Henry the second, Richard the first, and John; and first of their titles to the Crown, and disposition in government | p.165 |
| B 2 | Chap. |

The Contents.

- Chap. 58. *Of the state of the Nobility of England from the Conquest, and during the Reigne of these severall Kings* p. 172
- Chap. 59. *Of the state of the Clergie, and their power in this Kingdome from the Norman time* p. 175
- Chap. 60. *Of the English Communalty since the Norman time* p. 188
- Chap. 61. *Of Judicature, the Courts, and their Judges* p. 189
- Chap. 62. *Of certaine Laws of judicature in the time of Henry the 2.* p. 193
- Chap. 63. *Of the Militia of this Kingdome during the Reigne of these Kings* p. 205
- Chap. 64. *Of the government of Henry the third, Edward the first, and Edward the second, Kings of England: And first a generall view of the disposition of their government* p. 207
- Chap. 65. *Of the condition of the Nobility of England till the time of Edward the third* p. 221
- Chap. 66. *Of the state of the English Clergie untill the time of Edward the third: and herein concerning the Statutes of Circumspecte agatis, Articuli cleri, and of Generall Councels, and Nationall Synods* p. 225
- Chap. 67. *Of the condition of the Free men of England, and the grand Charter, and severall Statutes concerning the same, during the Reigne of these Kings* p. 253
- Chap. 68. *Of Courts, and their proceedings* p. 284
- Chap. 69. *Of Coroners, Sheriffs, and Crowne pleas* p. 286
- Chap. 70. *Of the Militia during these Kings reignes* p. 294
- Chap. 71. *Of the Peace* p. 300

Prologue



PROLOGUE.



*He policie of English government,
so farre as is praise-worthy, is all
one with Divine providence,
wrapped up in a vaile of Kings
and wise men, and thus implicitly
bath been delivered to the World by Historians,
who for the most part doe read men, and weare
their Pens in decyphering their persons and con-
ditions: some of whom, having met with in-
genuous Writers, suruive themselves, possibly
more famous after death then before: Others
after a miserable life wasted are yet more mise-
rable in being little better then tables to set forth
the Painters workmanship, and to let the World
know that their Historians are more witty then
themselves of whom they wrote were either wise*

or

PROLOGUE.

or good. And thus History that should be a witness of Truth and time, becomes little better then a parable, or rather then a nonsense in a faire Character, whose best commendation is that its well written.

Doubtlesse Histories of persons or lives of men have their excellency in fruit, for imitation and continuance of fame, as a reward of vertue: yet will not the coöercervation of these together declare the nature of a Common-weale better, then the beauty of a body dismembred is revived by thrusting together the members, which cannot be without deformity. Nor will it be denied but many wise and good Kings and Queenes of this Realme may justly challenge the honour of passing many excellent Lawes, (albeit its the proper worke of the representative body to forme them) yet to no one nor all of them can we attribute the honour of that wisdom and goodnesse that constituted this blessed frame of government; for seldome is it seen that one Prince buildeth upon the foundation of his predecessour, or pursueth his ends or aimes; because as severall men they have severall judgements and desires, and are subject to a Royall
kind

PROLOGUE.

kind of selfe-love that inciteth them either to exceed former presidents, or at least to differ from them that they may not seem to rule by copping as insufficient of themselves; which is a kind of disparagement to such as are above. Adde hereunto that its not to be conceited that the wisest of our ancestors saw the Idea of this government; nor was it any where in president but in him that determined the same from eternity; for as no Nation can shew more variety and inconstancy in the government of Princes then this, especially for three hundred yeeres next ensuing the Normans: so reason cannot move imagination that these wheeles, by divers, if not contrary motions, could ever conspire into this temperature of policy, were there not some primum mobile that hath ever kept one constant motion in all.

My aime therefore shall be to lay aside the consideration of man as much as may be, and to extract a summary view of the cardinall passes of the government of this Kingdome, and to glance at various aspects of the ancient upon the moderne, that so these divers Princes and wise counsels in their different course may appeare to be

PROLOGUE.

be no other then the instruments of him that is but one, and of one mind, whose goings forth have been in a continuall course of Wisdome and goodnesse for our selves in these latter daies: and herein I am encouraged because I am not in danger of temptation to flattery or spleene, nor pinched with penury of grounds of observation; having to doe with a Nation, then vvhich a cleerer miror of Gods gracious government is not to be found amongst all the Nations and peoples under Heaven.



An Historicall Discourse of the uniforme Government of ENGLAND.

CHAP. I.

Of the Britons, and their government.



His is *Britaine*; or rather that part thereof in after
ages called *Saxony* and *England*, from the peo-
ples names transplanted thither. The Britons
(to lay aside all conceits of Fame) I take to
be an issue of the neighbouring Nations from
the German and Belgicke shores; induced
hereto partly by the vicinity of the names of the Peoples, Cities,
or Towns, and places, but more of their manners and customs,
both in Religion and civill Government. Barbarians they were,
and so esteemed by the Romans that were but refined Barbarians
themselves; and yet they worshipped an Invisible, Infinite, Om-
nipotent God by Sacrifices: but the greatest part of their reve-
rence fell short, and rested upon their Priests; whom they ac-
counted the onely Secretaries that God had on earth; feared
their interdiction worse then death it selfe; and (in these times of
uttermost darknesse) held them forth to neighbouring Nations;

Cæf.com. l. 5.

Tacit. Anal.

Amian. lib 15.

Cæf.com. lib. 6

Tacit.

to instruct them into an higher excellency then that of brutish men.

Cæs.com.lib. 5.

Lib. 6.

Hieron.

Cæs.com. 6.

In their civill Government they allowed preeminence to their Magistrates rather then Supremacy, and had many chieftes in a little roome; the Romans called them little Kings, for the greater renown of their Empire: but others of more sobriety account them no better then Lords. Of liberties not much exceeding those of a City; and these (though in time of peace independant upon each other, yea perpetuall enemies, yet) in time of forraine war, joyned together to chuse one head to command themall, according to the custome of the Germans, as *Cæsar* noteth. But that which yet cleareth the matter, is the testimony of *Dion* in the life of *Severus* the Emperour, who expressly saith, that in *Britaine* the people held the helme of Government in their own power, so as these were not Kings nor their government Monarchicall, and yet might be regular enough, considering the rudeness that in those daies overspread the World. True it is that by a holy man this Nation was in latter times of barbarisme called *Tyrannorum gens*, the word being taken *mitiori sensu*, or from a common repute of excessive cruelty or oppression by superiours. As touching their cruelty, I finde no footsteps in story: somewhat reflecteth upon their Sacrifices, as if they offered mans flesh; but that was common to the Gauls, who borrowed their Religion from *Britaine*; and it might be founded rather upon an error in judgement then savagenesse of nature. Much lesse cause doth appeare of any cry of oppression upon inferiours, but rather against that; as the multitude of Kings or Lords doe manifestly witnesse, who being observed in the time of *Julius Cæsar* continued in *Tiberius* his time and afterwards untill in the reigne of *Claudius* tis said that *Caractacus* ruled over many Nations: for its a certaine maxime, that though great Nations may be upholden by power, small Territories must be maintained by justice; without which the doore will be soon set open to the next passenger that comes, especially where the people are bent to war as these were, and therein had attained such exquisite perfection of skill in Chariot service, as must needs convince us of their much experience against themselves in regard that to other people it was scarce known; no nor yet to *Cæsar* himselfe that had been

been practised in the wars of all Nations. And this is all that I can produce out of story touching the government of *Britaine* before the entry of that light that lightneth every one that cometh into the world.

CHAP. II:

Concerning the conversion of the Britons unto the Faith.

IT was long before the Sonne of God was inwombed, and whiles as yet Providence seemed to close onely with the Jewish Nation, and to hover over it, as a choice picked place from all the earth, that with a gracious eye surveying the forsaken condition of other Nations it glanced upon this Island; both thoughts and words reflected on *Isles*, *Isles* of the Gentiles, *Isles* afar off, as if amongst them the Lord of all the earth had found out one place that should be to him as the Gemme of the ring of this Terrestriall Globe: and if the waies of future providence may be looked upon as a glosse of those Prophecies: we must confesse that this Island was conceived in the wombe thereof long before it was manifested to the world.

Isa. 42. 4.
51. 5.
60. 9.
66. 19.

To recover the forgotten waies of past providence is no lesse difficult then to search out the hidden bowels of future promises; and therefore I shall not busie my selfe to finde out the particular instruments that brought Gods presence into this dark corner; but onely glance at the time and manner, that it may appeare we were not forgotten, nor yet last, or least in mind, at that time of the dispensation of this grace unto all men. I dare not instance as *Gildas*, the certaine time of six yeeres; yet I may say, that no sooner was the Scepter departed from *Judah*, but with a swift pace both it and the Lawgiver came hither like an Arrow flying through other Countries, but sticking with a *ne plus ultra* in this Island (then a People rather then a Commonweale) as if we were the onely white that then was in Gods aime. Its probable in the highest degree that the worke was done within the first Century, and very nigh about the Apostolike times; for that in the second Century *Britaine* was a

Tertul. adv.
Judæos.

Platina. de vir.
Eleuthe.

Beda. l. 3.
cap. 25.

Church of Fame, and known to the Fathers that dwelt as farre off, even to *Tertullian* and *Origen*, and in a short time had out-reached the Roman confines in that Island (which had cost them above two hundred yeeres travaile) and was grown to the state of the first Christian Kingdome that ever was : unto which, if we shall allow time for the gathering and growth thereof unto this royall pitch, proportionable to the halfe of that which afterward was spent in the like worke, upon the Saxon and Danish Kings, we must in reason conclude that the worke was first ordered by Apostolicall direction, or some of their emissaries. Customes also do not obscurely declare ages. For before that *Pius* Bishop of *Rome* began to speake in the big language of Decrees, it was indifferent to keepe Easter either upon the day observed by the Roman Church, or on the day according to the Jewes custome; and although the Roman Church began within fifty yeeres after the death of *John* the Evangelist, to stickle to impose their custome upon other Churches; yet the Church of *Britaine* conformed not to that course by the space of five hundred yeeres after that time; which reflecteth probability, that the Church was there settled in times of indifferency, not by Roman order, but by some other purposed messenger.

The manner yet is more remarkable, for that not onely Principalities and Powers, and Spirituall wickednesses in high places (which are but stumbling-blocks) but also naturall wisdom of the Druides, who were masters of the consciences of the Britons, and their high concept of their excellency above the ordinary straine of men, and unto which the Crosse of Christ is meere foolishnesse; and above all, the deep obligation of the people unto these their Rabbies, in a devotion beyond the reach of other Nations; all these, I say, stood in the way, and rendred the people more incapable of any new light. But when the time fore-set is fully come, all mountaines are laid low, and double-folded doores fly open; and this Conquerour of all Nations attempts *Britaine* not in the reare, nor by undermining, but assailes them in their full strength, presents in a cleare Sunshine that one true Sacrifice of God man; at the appearing whereof their shadowes of many Sacrifices of mans flesh

flesh flie away. And thus those Druides that formerly had dominion of the Britons faith, become now to be helpers of their joy, and are become the leaders of the blind people in a better way, and unto a better hope; and held forth that light which through Gods mercy hath continued in this Island ever since through many stormes and darke mists of time untill the present noon-day.

Origen, hom. 4.
Ezek.

CHAP. III.

Of the entry of the Romans into Britaine, and the state thereof during their continuance.

THis conversion of the Druides was but the first step to that which followed; for the Decree was more full of grace then to make this Isle to be onely as an Inne for him to whom it was formerly given for a possession; The Romans are called in to the worke, under whose Iron yoke God had subdued all Nations, thereby more speedily to bring to passe his own conquest, both of that one head, and all its members. The first *Cæsar* had entred *Britaine* before the Incarnation, and having seen and saluted it, and played his prize, returned with the same onely of conquest of some few Lordships neighbouring to the Belgicke shore; and so it continued correspondent to the Romans, or rather forgotten of them till the time of *Claudius* the Emperour, who being at leasure to bethink him of the Britons tribute, or rather aspiring to honour by a way formerly untroden by his Ancestors, first settled Colonies in *Britaine*, and brought it into the forme of a Province, and ingaged his successors in a continuall war to perfect that worke, which outwearied their strength at last, and made them forgoe the prey, as too heavy for the Eagle to trusse and carry away.

Ps. 2. 3.

Tacit.

Vit. Agric.

It oft befals that things of deformed shape are neverthelesse of excellent spirit, and serve the turne best of all: and it is no lesse remarkable, that this tyde of Roman invasion, however it represented to the world little other then a tumour of vain-glory in the Romans that must needs be fatall to the Britons liberty

Tacit. vit.
Agric.

liberty and welfare : yet by over-ruling providence it conducted so much to the Britons future glory, as it must be acknowledged one of the chiefe master-pieces of supernaturall moderatorship that ever this poore Island met with. First, it taught them to beare the yoke, to stoop, and become tractable; for stubborn spirits must first stoop under power, before they will stoop to instruction; but this onely in the way; for tractableness, if good ensue not, is of it selfe but a disposition for evill. Secondly, it brought into *Britaine* the knowledge of Arts and civility; and questionlesse it was a wise policy of *Agricola* to goe that way to worke; for its an easie and Royall worke to governe wise men, but to governe fooles or mad men is a continuall slavery; and thus religion already setled in *Britaine* became honoured with a traine of attendants, and handmaids. Thirdly, they reduced the number of little Lordships nigher to the more honourable estate of Monarchy : for the Romans by deere experience finding no stability or assurance in what they had gotten, so long as so many petty Kings had the rule; they wisely brought the whole into one Province (because it is much easier to governe many subordinate each to other, then co-ordinate one with another) over which they allowed one chiefe, to rule the people according to their own Lawes, saving their service to the Romans and their Lieutenants, untill they were necessitated to yeeld up all to the next occupant: This served the British Church with a double interest. For first, Religion spreads sooner under one uniform government, then under variety; and under Monarchy, rightly ordered, rather then any other government whatsoever; albeit that other governments may afford it faster footing when it is entred. Secondly, *Rome* was a renowned Church throughout the world for gifts and graces; and it is obvious to conceive that it was specially purposed by divine providence to make that place a fountaine, that from thence the knowledge of Christ might convey it selfe joyntly with the influence of Imperiall power, as the spirits with the blood, into all Nations of that vast body.

Above one hundred yeeres were spent in this Provinciall way of government of *Britaine* under the Roman Lieutenants; during all which time Religion spread under ground, whiles
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the Roman power in a continuall war sprang upward: Nor is it strange that Religion should thrive in warre; the French wars in *Edward* the thirds time brought much of this happinesse to *England* from the *Waldenses*; and *Germany* had no lesse benefit by the wars of *Charles* the fifth with the *Italians*, *French*, and *Turks*: and thus the Romans leavened with the Gospell, by exchanging men with *Britaine*, and other mutuall correspondencies insinuated that leaven by degrees, which in the conclusion prevailed over all.

For the Roman Lieutenants having gotten sure footing in *Britaine*, steered their course with a different hand; generally they were of the Roman stampe, seeking to kill Christ in the Cradle; and by that meanes Religion met with many bitter storms of bitter persecution, and so was compelled to beare a low saile; but some being more debonaire, and of wiser observation, soon found, that the way of justice and gentleness had more force in *Britaine* then Armes, and so endeavoured to maintaine that by moderation which they had gotten by labour and blood (as it is ever seen that where conquest is in the van, gentleness follows in the reare, because no Bow can stand long bent but at length must give in and grow weake.) And thus by connivance the Britons got a little more scope, and Religion more encouragement, till it became acquainted with the Roman Deputies, began to treat with the Emperours themselves, and under the wise government of *Aurelius* the Emperour mounting into the Brittish throne, crowned *Lucius* first of all Kings with the Royall Title of a Christian.

He now not so much a vassall as a friend, and ally to the Romans, and perceiving the Empire to be past noon, and their Lieutenants to comply with the Christians, began to provide for future generations, and according to the two grand defects of Religion and Justice, applied himselfe for the establishment of both.

Religion in *Britaine* hath hitherto been for the most part maintained by immediate influence from Heaven. No Schools, no learning, either maintained or desired; the want whereof, together with the persecutions stirred up by the Emperours, especially *Domitian*, brought the Church to so low an ebbe that
the

M. Westm.
an. 181.

the Sacraments ceased ; for Histories tell us that *Lucius* sent to *Rome* for reliefe, and that the Bishop of that place (whether *Evaristus* or *Eleutherius*) sent over learned men to preach and baptize both King and people ; and in this, *Rome* might probably gaine some honour, although possibly the King intended it not, or muchlesse to acknowledge any authority or power in that Church over that of *Britaine*. This act of *Lucius* so advanced him in the opinion of writers, that they know not when they have said enough ; Some will have him to be the instrument of the first entry of Religion into this Isle : others, that he settled a forme of Church-government under the three Archbishops of *London*, *Yorke*, and *Caerlion* upon *Uske*, and 28 Bishopricks ; the first of which is cried down by many demonstrative instances, nor can it consist with the second, nor that with it, or with the truth of other stories. For it neither can be made out that *Lucius* had that large circuit within his Dominion ; nor that the title of Archbishop was in his daies known ; and tis very improbable that the British Church was so numerous, or that Religion in his time was overspread the whole Island: nor is there any mention in any Authour of any Monuments of these Archbishops or Bishops of *Britaine* for the space of 200 yeeres after this Kings reign, and yet no continuall raging persecution (that we read of) that should enforce them to obscure their profession, or hide their heads : or if such times had been, it would have been expected that Bishops in those daies should be in *Britaine* (as well as in other places) most famous for gifts and graces, and passe in the forefront of persecution. But we finde no such thing ; no not in the rages of *Dioclesian*, which made the British Church famous for Martyrs : Writers speake of *Alban*, *Amphibalus*, *Aron*, *Julius*, and a multitude of Laypeople, but do not mention one Bishop, nor Presbyter, nor other Clergyman, but *quendam Clericum*, a man it seems of no note, and of unknown name. In charity therefore the English Church in those daies must be of mean repute for outward pompe ; and not lifted up to that height of Archbishops, when as *Rome* it selfe was content with a Bishop.

M. Westm.
an. 303.

Somewhat more probable it is, that is noted by writers concerning *Lucius* his endeavour to settle the Common-wealth, and

and good Lawes for government; and to that end did write a Letter to *Eleutherius* Bishop of *Rome* for a modell of the Roman Lawes; probably being induced thereunto by the splendor of the state of the Roman Church and Common-weale; the onely favourite of fame in those times through the Northern parts of the World. Things afar off I confesse are dim, and its meet that Antiquaries should have the honour due to great after-sight. And therefore I might think (as some of them have done) that the Epistle of *Eleutherius* to King *Lucius* is spurious, if I could imagine to what end any man should hazard his wits upon such a fiction; or if the incongruities charged against it were incurable; but being allowed to be first written in Latine, and then translated into British for the peoples satisfaction; and in that Language (the originall being lost) traduced to posterity; and then by some Latine writer in after ages returned into Latine, and so derived to these times (all which very probably hath been) such occasions of exceptions might well arise by mistake of translators and transcribers in ignorant times, and the substance nevertheless remaine entire and true. Considering therefore that the matter of that Epistle favoureth of the purer times of the Church, and so contrary to the dregs of *Romulus*, I meane, the policy, practice and language of the Roman Clergy, in these latter ages, wherein this forgery (if so it be) was made; I must allow it to passe for currant for the substance, not justifying the syllabicall writing thereof.

Cic. Attic. 2.

To others it seemeth needlesse and vaine that *Lucius* should send for a modell to *Eleutherius*, when as the Roman Deputies and Legions at home might have satisfied the Kings desire in that particular, or their owne experience might have taught them grounds sufficient, after two hundred yeeres converse with the Romans, that they should have little needed a modell for that which they saw continually before their view, or might have understood by inquiry of their own acquaintance. But what could be expected of rough souldiers concerning forme of government of a Common-weale? or if some exceeded the ordinary straine in policy, yet they were too wise to communicate such Pearles to conquered Nations, that ought to look no higher then the will of the Conquerour, and subsist

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in no better condition then may be controlled by the Supream Imperiall Law of the Lord *Paramount* : or if in this they had corresponded to the desires of the Brittaines, yet being for the most part ignorant of the maine, they could never have satisfied the expectations of a Christian King, who desires such a Law as may befriend Religion, and wherein no man was more like to give direction then *Eleutherius*, who seeing a kind of enmity between the Roman Lawes, and Christs Kingdom, sends to the King a fair refusall of his request upon this ground, that *leges Romanas & Caesaris semper reprobare possumus*; he saw that they were not well grounded; he therefore refers the King to the sacred Scripture, that is truth it selfe. Lawes that come nighest to it are most constant, and make the government more easie for the Magistrate, quiet for the people, and delightfull to all; because mens minds are settled in expectation of future events in government according to the present rule; and changes in course of government are looked at as uncouth motions of the Celestiall bodies, portending judgements or dissolution. This was the way of humane wisdom; but God had an eye on all this beyond all reach of preconcept of man, which was to make *England* happy in the enjoying of a better Law and government then *Rome*, how glorious soever then it was; and to deliver that Island from the common danger of the world; for had we once come under the law of the first beast, as we were under his power; we had been in danger of being borne slaves under the Law of the second beast, as other Nations were, who cannot shake it off to this day.

But *Lucius* lived not to effect this worke; it was much delayed by the evill of the times; nothing was more changeable then the Empire grew; the Emperours many of them so vicious, as they were a burden to mankind; nor could they endure any Deputy or Lieutenant that were of better fame then themselves had. Some of them minded the affaires of the East, others of the North; none of them were *ad omnia*: And the Lieutenants in *Britaine* either too good for their Emperour, and so were soon removed; or too bad for the people of the Land, and never suffered to rest free from tumults and insurrections: neither *Lucius* could prevaile, nor any of his successors.

fors. But passing through continuall crosse floods of persecutions under *Maximinus*, *Dioclesian* and *Maximinianus*, and many civill broyles, till the times of *Constantine*, at length it attained the haven.

For *Constantine* having overcome *Maxentius*, and gotten thereby into the highest Orbe of government in the Empire; reflected such an amiable aspect upon the Churches; especially in *Britaine*, as if he had intended to pay to them all that God had lent him. A wise Prince he was questionlesse; yet towards the Church shewed more affection; endeavouring to reduce the government in every place unto the Roman Prototype, and therein added much honour to that See, especially to Pope *Sylvester*, whose Scholler he had been. This may seem a sufficient inducement to perswade that he was the first patron of English Prelacy, seeing we finde it in no approved testimony before that time; nor was it long after, whenas the presence of the Brittish Bishops are found at the Synod by him called at *Arles*, viz. the Bishops (not Archbishops) of *London* and *Torke*, and the Bishop of *Maldune*; and those in no great pompe, if the relation be true, that by reason of their poverty they were not able to undergoe the charge of their journey and attendance, so as it seems they had but new set up, and had not yet found out the right way of trade that other Bishops had attained. And thus God ordered first the setting of a Government of the Church in *Britaine*, and its Liberties, before the Secular part enjoyed any; therein working with this Nation as with a man, making him to be *bonus homo* before he can be *bonus civis*.

Concil. Brit.
42.

The Church of *Britaine* thus set together, is wound up for motion; they soon learnd the use of Synods, from that Synod at *Arles*, if they had it not before; and tooke as much power to themselves in their Synods as in other Countries was used, and somewhat more to boot. For they had the hap to continue in *Britaine* in free course a full century of yeeres before the civill Magistrate had any other power, but what was wrapped up under the allowance of their Roman Masters, who like *Gallio* looked upon the Church affaires as out of their Spheare, and therefore cared for none of those things; or if the zeale of

any See far prevailed; it was much in favour of the Bishops upon whom the Emperours began to dote as Oracles; and this raised the price of the Clergy, and taught them the way to fish for themselves: No wonder it is therefore if Synods in *Britaine*, or rather the Clergy in the Synods (which probably were then the representative body of the Nation) swayed all that was free from the Roman Magistracy, and in some things out-reached their limits; especially during this interim wherein the Romans held the armes of civill Magistracy bound and let the Clergy have their scope, that soon began to be ambient, and conceipt a new Idea of deportment, like that of the second beaſt in its infancy: Nor did the Britons espy their danger herein, for they had been used to idolize their Druides; and it was no more but faces about to do as much for their Bishops. Of this power of Synods I shall propound but three preidents, and so draw to a conclusion of what I think meet to note concerning the British affaires. I suppose it will not be doubted but that publique consultations concerning the publique government of any place or Nation, ought not to be called but by the Supream power; and that such consultations are to be directed by that Supream power. The Britons had a King, and yet without his consent they call a Synod against the Pelagian Heresie, and chuse a Moderator from beyond the Sea, and by that Synod not onely overwhelmed the Heresie, but excommunicated their King. This was a Nationall Synod, and might well stand with the rule of State, which then had seated the Supream power in the people, as I formerly noted out of *Dion*. But it could be no warrant for that which followed, viz. that a Country Synod should excommunicate a King, as it befell in the cases of *Adoris* and *Morcant*. Or that such a Synod should intermeddle in matters of *meum* and *tuum*, as in the case of *Lounrick*, who having invaded the patrimony of the Church, the Bishop of *Lindiff* in a Synod of his Clergy enjoined him penance; and the like befell unto *Bockvaile*, who was compelled by the Synod to make amends to *Civiliack* Bishop of *Lindiff* for injury to him done: which I note not by way of imputation; for this exorbitancy (if so it were) might correspond with these times wherein very probable it is that justice could

not

M. Westm.
An. 446. Beda.
Lib. 1. cap. 17

Concil. Brit.
p. 9, 6 332.

Concil. Brit.
385.

not be had elſewhere; and had the Clergy been as carefull of holineſſe, as in the former caſes they ſeem jealous for juſtice, *Britaine* muſt have had the repute of a Nation of Priests and holy men, rather then of Tyrants: whereas it was become a glut of wickedneſſe, and a burden that God would endure no longer which rendreth their Synod lyable to exception, as being ſuch as were either liſted up, or drawn aſide, and as the Liſt to the Cloth, ſheweth that the Nation ſtood in need of that inſtruction which with a ſtrong hand God wrought into them by the ſad calamity which enſueth. Gildas.

CHAP. IV.

Of the entry of the Saxons, and their manner of Government.

WAſted with time, and wounded by eternall doom, the glory of the Weſterne Empire going down apace, now draweth nigh unto its everlaſting night; and that vaſt body (not able longer to ſubſiſt, but dying by degrees) abandons this Iſle of *Britaine* its utmoſt limmit, and laſt inlivened to ſubſiſt alone miſerably or elſe to die. The choiſe was more difficult by how much the more *England* was much waſted in the Roman wars, the flower of their ſtrength ſpent in forraigne ſervice, the remainder but few, and theſe exceeding vicious; and which was worſt of all, ingaged by the Romans in a warre with the Picts, againſt whom the Romans themſelves found it too burdenſome for them to hold out, without the helpe of a wall: and albeit that the very name of an old ſervant of foure hundred yeeres continuance might have moved a Roman heart to commiſeration, yet their ſpirits faile, and forſaken *England* muſt now goe into the Wilderneſſe, and naked as they are endure the brunt of the cold ſtormes of the Northern Picts, without any ſhelter but the hidden will of God then throwing upon them. In this condition they halfe deſperate ſeek for a cure in reaſon worſe then the diſeaſe. For it had been better for them to have ſtooped to hard conditions with the Picts, conſidering

Aman, 1.16.

Zoffimus hist.
lib.3.Amian.lib.28,
30.Suffrid.Petrus
Frif.antiquit.
lib.3. cap.1.

sidering they were all but one people, and differing onely by the bredth of a wall, then to call in a new people whose qualicies they were ignorant of, and at the best to make them their companions, who might prove (as they afterwards did) both Lords and Masters over them. But there is no reason against Gods will. The Britons needed present helpe, they overlayd by invasions from the Picts (who soon espied the Romans gone and their own advantage) sent for ayde where they were most like to speed for the present, and left the future to look to it selfe. *Ireland* was nigh, but we finde nothing concerning their interest in shipping; the French coasts were not their own men, being yet within the Roman Line: and none were at liberty but such as were never subdued by the Romans: Onely the Saxons are in the thoughts of the Britons, a mighty people not farre off, able to mate the Romans in their chiefeft pride, and though in a manner borderers upon the Roman world, yet unsubdued by them, used to the wars, mighty at Sea; and now given over by the Romans in a plain field, were at leasure, and so well knew the way to *Britaine*, that the Romans intituled the coasts of *Norfolke* and *Suffolke* the Saxon coasts, from the many visits that the Saxons had already made into those parts full fore against the Romans wils.

I hold it both needlesse and fruitlesse to enter into the Lists concerning the originall of the Saxons; whither they were natives from the Northern parts of *Germany*, or the reliques of the *Macedonian* army under *Alexander*. But it seems their government about the time of *Tiberius* was in the generall so futable to the Græcians, as if not by the reliques of *Alexanders* army (which is generally agreed emptied it selfe into the North) yet by the neighbourhood of *Greece* unto these Nations, it cannot be imagined but much of the Græcian wisdom was derived into those parts long before the Romans glory was mounted up to the full pitch: and because this wisdom could never be thus imported but in vessels of mans flesh rigged according to the Grecian guize, it may be well supposed that there is some consanguinity between the Saxons and the Græcians, although the degrees be not known. The people were a free people, governed by Lawes, and those made not after the manner

manner of the Gauls (as *Cæsar* noteth) by the great men, but by the people; and therefore called a free people, because they are a Law to themselves; and this was a privilege belonging to all the Germans, as *Tacitus* observeth, in cases of most publique consequence (*de majoribus omnes*) like unto the manner both of the Athenians and Lacedemonians in their *Concio*. For which cause also I take the Gauls to be strangers in blood unto the Britons, however nigh they were in habitation. That some matters of action (especially concerning the publique safety) were by that generall vote concluded and ordered, seemes probable by their manner of meeting with their weapons. But such matters as were of lesse concernment the Councell of Lords determined *de minoribus Principes*, saith the same Author. Their Countrey they divided into Counties or Circuits, all under the government of twelve Lords, like the Athenian territory under the *Archontes*. These (with the other Princes) had the judicatory power of distributive justice committed to them, together with one hundred of the Commons out of each division. The election of these Princes with their commission was concluded *inter majora* by the generall assembly; and they executed their commission in circuits, like unto the Athenian *Heliastie* or Subdiall Court, which was rurall and for the most part kept in the open ayre; in brieve, their judicials were very sutable to the Athenian, but their military more like the Lacedemonian, whom above all others in their manners they most resembled. In their Religion they were very devout, saving that they much rested in the reverence they bare to their Priests whom they made the moderator of their generall Assembly, their Judge, advocate and executioner in Martiall Law, therein submitting to them as unto Gods instrument. They worship an invisible and an infinite Diety: mans flesh is their sacrifice of highest account: and as often as they make inquiry by lots, they doe it with that solempne reverence as may put all the Christian world to the blush, *precaturs Deos, cælumque suspiciens*; and this done by the Priest of the Town (if it be in publique causes;) or otherwise, if private, then by the master of the family; so as they had family-worship as well as publique. These things I note, that it may appeare how

Cæsar. com.

Histor. Germ.
Plutarch. vir.
Solon. & Ly.
curg.

Albinus. Sax.
72.

Xenophon.

Tacit.

Emius.

Avent. Aral.
Bowr l. 10.
Beuer. in
Tacit. 125.

Amian:

how nigh these invited guests resemble the old Religion of the Britons, and how probable it is that this Island hath from time to time been no other then as a sewer to empty the superfluity of the German Nations; and how the influence of these old principles doth worke in the fundamentall government of this Kingdom to this present day. These are the instruments chosen by God, and called by the Britaines to be their deliverers from their enemies; which they did indeed, yet not swayed thereto by love of justice or compassion; for (if writers say true) they were no better then high-way men both by Sea and Land, but by their love of spoyle and prey and by the displeasure of God against a dissolute people. They professe friendship neverthelesse in their first entrance; but espying the weaknesse of the Britons and feeling the strength of the Picts, and finding the Land large and good, they soone pickt quarrels with their Hoast, made peace with the Picts, and of fained friends becomming unfained foes to the Britons, scattered a poore remnant of Christians, some to the furthest corners of the Kingdom, others into forraine Nations, like so many seedesmen to sow the precious seed of life in a savage soile. And those few that remained behind profiting under much misery, by their doctrine and good example yeilded better blessings unto their new come guests then they either expected, or desired. And thus the miseries of poore Britaine became riches of mercy to the North and Easterne people; and the ruines here, the foundations of many famous Churches elsewhere. Nor yet was mercy from the Britons utterly taken away, nor their blood drawn out to the last drop; or their name quite blotted out of the booke of fame: for whereas two things make men miserable, *viz.* the heaviness of the burthen without, and the failing of the heart within, and Gods ordinary way of redresse of the former beginneth in taking away the later; thus dealt he with the Britons: for in danger as want of strength breeds feare, and that (by extreimity) dispaire, so dispaire oftentimes revives into a kind of rage that puts strength forth beyond reason; I say beyond reason, for cause cannot be given thereof, other then Gods extraordinary dispensation in a judiciary way, when he seeth the stronger to

wax insolent over the weaker. Thus the Britons fled from the Picts so long as they had any hope of reliefe from the Saxons; but being become their enemies, and pursuing them to the low water marke, that in all reason they must either drinke or bleed their last; then their courage revived, and by divers victories by the space of 200 yeeres God stopped the hasty conquest of the Saxons: the result whereof by truces, leagues, commerce, conversation, and marriages between these two Nations declared plainly that it was too late for the Saxons to get all, their bounds being predetermined by God, and thus declared to the world. In all which God (taming the Britons pride by the Saxons power, and discovering the Saxons darknesse by the Britons light) made himselfe Lord over both peoples in the conclusion.

CHAP. V:

Of Austins comming to the Saxons in England, his entertainment, and worke.

DURING these troublesome times came a third party that wrought more trouble to this Isle then either Pict or Saxon; for it troubled all. This was the Canonick power of the Roman Bishop, now called the Universall Bishop. For the Roman Empire having removed the Imperiall residence to *Constantinople* weakned the Westerne part of the Empire, and exposed it not onely to the forraine invasions of the Goths, Vandals, Herules, Lombards, and other flotes of people that about these times by secret instinct were weary of their owne dwellings, but also to the rising power of the Bishop of *Rome*, and purposely for his advancement; Who by patience out rode the stormes of forraine force, and tooke advantage of those publique calamitous times to insinuate deeper into the consciences of distressed people, that knew no other consolation in a plundered estate, but from God and the Bishop, who was the chiefe in ac-

Naucle. 503

count amongst them; the beauty of the Bishop of Rome thus growing in the West, made him to out-reach not onely his owne Diocesse and Province, but to minde a kind of Ecclesiasticall Empire, and a title according thereunto; which at length he attained from an Emperour fitted for his turne: and this was enough to make him passe for currant in the Empire. But *Britaine* was forsaken by the Roman Empire above 153 yeeres before: so as, though the Emperour could preferre his Chaplaines power or honour as far as his owne, which was to the French shore: yet *Britaine* was in another world, under the Saxons power, and not worth looking after till the plundering was over, and the Saxon affaires settled, so as some fat may be had; then an instrument is sought after for the worke, and none is found so farre fit to winde the Saxon up to the Roman bent as a Monke, that was a holy humble man in the opinion of all but of those that were so in the truth, and knew him. This is *Austin*, sent by Pope Gregory to doe a worke that would not be publicly owned; it was pretended to bring Religion to the Saxons in England; therefore, they give him the title of the Saxon Apostle; but to be plaine, it was to bring in a Church-policy, with a kind of worship that rendred the *Latria* to God, and the *Dulia* to Rome. The Saxons were not wholly destitute of Religion; and that, Gregory himselfe in his Letter to *Brunchilda* the French Queen confesseth: *Indicanus*, saith he, *ad nos pervenisse Ecclesiam Anglicanam velle fieri Christianam*; so as there was a good disposition to religion before ever *Austen* came, and such an one as rang loud to Rome. But farre more evident is it from the Saxons keeping of Easter more *Aseiatice*, which custome also continued after *Austen* comming fifty yeeres, sore against *Austens* will: the dispute between *Coleman* and *Wilfride* beares witness to that: and it had been a miraculous ignorance or hardnesse, had the Saxons a people ordained for mercy (as the sequell shewed) conversed with the Christian Brittaines and Picts above 150 yeeres without all touch of their Religion. If we then take *Austen* in his best colour, he might be said to bring religion to the South-Saxons, after the Roman garbe; and his hottest disputes about Easter, Tonsure, the Roman supremacy and

Greg. Epist.
lib. 5. Epist. 59.

Bed. hist. lib. 3.
cap. 25.

Bed. hist. lib. 1.
cap. 23.
Lib. 3, cap. 4.

and his owne Legatine power, and his worthy *Queres* to the Pope shew he regarded more the fashion then the thing; and the fashion of his person more then the worke he pretended; for he loved state, and to be somewhat like to the Legate of an Univerall Bishop; and therefore of a Monke he suddenly becomes a Bishop in *Germany*, before ever he had a Diocesse, or saw *England*; and after he perceived that his worke was like to thrive, he returned and was made Archbishop of the Saxons, before any other Bishops were amongst them; and after three yeeres had the Pall, with title of supremacy over the British Bishops that never submitted to him.

His advantages were, first his entrance upon *Kent*, the furthest corner of all the Iland from the Britaines and Picts, and so lesse prejudiced by their Church-policy; and at that very time interessed in the Roman ayre above all the other Saxons; for their King had married a daughter of *France*, one that was a pupill to *Rome*, and a devout woman; she first brought *Austen* into acceptance with the King, who also at that present held the chiefe power of all the Saxon Kings in this Isle, which was now of great efficacy in this worke; for where Religion and power flow from one spring in one streame, its hard to chuse the one, and refuse the other. And thus *Rome* may thank *France* for the first earnest they had of all the riches of *England*, and we for the first entrance of all our ensuing bondage and misery. *Austen* had also a gift or trick of working miracles, wherein whither more suitable to the working of Satan or of God I cannot define. It seemes they walked onely in the dark; for either the Britons saw through them, or saw them not; nor could *Austen* with his miracles or finenesse settle one foot-step of his Church-policy amongst them; happily they remembering the Roman Dagon, liked the worse of the Roman woman; and the rather because the Carriage of their messenger was as full of the Archbishop, as it was empty of the Christian: I would not touch upon particular passages of action, but that its so remarkable that *Austen* himselve, but a novice in comparison of the British Bishops (the clearest lights that the Northern parts of the world then had) and unto whom the right hand of fellowship was due by the Roman Canon,

Bed. hist. lib. 1.
cap. 27.

Lib. 2. cap. 2.

Greg. Epist. 1. 7.
Epist. 13.

Concil. Brit.
92.

Bed. hist. lib. 1.
cap. 29.

Bed. hist. lib. 1.
cap. 25.

Greg. Epist.
lib. 9. Epist. 59.

2 Thes. 2.

should neverthelesse shew no more respect to them at their first solemn entrance into his presence then to vassals, as I could not but note the same as a strong argument that his whole work *ab initio* was but a vapour of Prelacy. This the British Bishops soon espied, and shaped him an answer sutable to his message, the substance whereof was afterward sent him in writing by the Abbot of Bangor; and of late published by Sir Henry Spelman, as followeth:

BE it known (and without doubt) unto you; that we all, and every one of us are obedient and subject to the Church of God, and to the Pope of Rome; and to every godly Christian, to love every one in his degree in perfect charity, and to helpe every one of them, by word and deed to be children of God: And other obedience then this I doe not know to be due to him whom you name to be Pope; nor by the father of fathers to be claimed or demanded. And this obedience we are ready to give and pay to him, and to every Christian continually. Besides we are under the government of the Bishop of Caerleon upon Uske, who is to oversee under God over us, and cause us to keep the way spirituall.

This was the Britons resolution, and they were as good as their word; for they maintained the liberty of their Church five hundred yeeres after this time, and were the last of all the Churches of Europe that gave their power to the Roman beast, and in the person of Henry the eighth that came of that blood by Tetard, the first that tooke away that power againe. Austen having met with this affront, and perceiving that the Britons were stronger in their faith then he by his miracles, cast about to try the Saxons curtesie, that what the Ephod could not, the Sword wrapt up therein should. I say not that he procured, but he threatned or prophesied the destruction of the Monkes of Bangor; and it came to passe, and its by writers loudly suspected. Neverthelesse the Saxons were not so zealous of their new Religion, as to make a new Nationall quarrell between the Britons and themselves, but left the game to be played out by

by *Austen*: who finding by experience that it would not prove the worke of one man; left it to successors to worke out by degrees in efflux of time. And thus *Austen* neither good servant to the Servant of Servants, nor good Monke, retires to settle his Saxon province, and to present or rather to prostitute it to the lusts of that red whore, which was the generall piety of those ignorant times.

CHAP. VI.

Of the embodying of Prelacy into the government of this Kingdome.

I Cannot think that the platforme of the mystery of Iniquity (when boyled to the hight) was ever foreseen, or in the aime of the wicked spirits on earth, or those in hell; yet were they all instruments of this monstrous birth; filled with subtilty and mischief; guided principally by occasion; and over-ruled by the Justice and Wisdome of God, to make a yoke for Monarchs, and a scourge to the world for their refusall of the government of Christ, untill this monster came to perfection, and wherein themselves were *feloes de se*, and wrought their owne mischief: for *Austen* comming in as a third proprietor with King and people; and having gathered the materials of a Church, reason told them that a forme of government must be settled in that Church; the Saxons had no principles of their own, (for they had no learning) and to goe to the Britons for a patterne might be thought ignoble; and where the choice is small its soone made; *Rome* held now the most part of the Churches of *Europe* at Schoole, the Saxons soon resolve *Rome* that had been their mother shall be also their father: and thus at one draught they dranke up a potion of the whole Hierarchy of *Rome* from the Pope to the apparator, with a *quicquid imponitur & imponetur*, which was of such lasting efficacy that it ceaseth not to worke even to this day; although it was slow in the first provocation: For the Saxons had a Commonweale founded in the liberty of the people; and it was a master-piece

Tacit. mor.
Serm.

piece for *Austen* and the Clergy, so to worke as to remaine
 members of this Commonweale, and yet retaine their hearts
 for *Rome*, (which was now grown almost to the pitch
 of that Antichrist:) for reason must needs tell them that the
 Saxon principles would not suffer them to be *ad omnia* for
Rome, nor the Roman Canon allow them to be wholly Saxons;
 and they saw plainly that the times were too tender to endure
 them to be declarative on either part, and therefore they chose
 a third way, which was to preserve the municipall Lawes in
 moderation towards the Canon; and to that end to endea-
 vour such a temper upon the State as must admit them to be in
 repute, such as without whom the Common-weale could not
 well subsist, no more then a body without a soule; and that
 few occasions should befall but at least in *ordine remoto* must
 reflect upon both; and then all reason will bespeake them to
 joyne in the legislative power and government of this King-
 dome; but especially as Bishops, who are now *Magna spes altera*
Roma, and the very top-flowers of wildome and learning. And
 unto this temper the Saxons were sufficiently prepared and in-
 clinable; for it was no new thing for them to admit their
 heathenish Priests into their generall meetings, and allow them
 much power therein, and then its but the person changed and
 they must doe as much for their Bishops now they are become
 Christian; especially themselves being all for the field, and
 overgrown with a generall ignorance, the common disease of
 those times. Kings were in no better condition; it was hard
 for them to be baptised and not to be baptised into *Rome*, and
 commonly under such a Covenant as though many might
 repent of, yet none durst amend: for whenas the Pope is Lord
 of the consciences of the People, the Kings power may some-
 times outface, but can never govern; the Saxon Kings were
 therefore faine to make a vertue of necessity, and advance Bi-
 shops to be common favorites both of *Rome* and themselves,
 to maintaine good correspondency between both Swords;
 and to countenance the power of the temporall Magistrate in
 cases of dispute, else he might oftentimes command, and yet
 goe without. Thus enter the Prelates upon affaires of Kings
 and Kingdomes, and became lovers of Lordships, and troublers

lers of States; and if in any thing they served their Countrey, they served Rome much more; their merchandise was made of the policies and Councils of all Kingdomes and States, and such returns proceeded as were still subservient to the Roman interest; and they so intoxicated the domestique counsels in such manner, as they generally staggered, and many times came short of home. Nevertheless at the first this was but rare, clancular, and covered with much modesty; for (excepting such choice spirits as *Austen* had) Roman Prelacy in these yonger times was but Velvet-headed, and endured not much greatnesse or bigge titles, but spake like a Lambe; *Ego non verbis quero prosperari sed moribus*, said this *Gregory* to the Alexandrian Bishop, who had put upon him the title of universall Bishop or Pope: and whereas he had in a way of Courtship called *Gregories* counsels commands, he startles at it; *quod verbum iussus* saith he, *peto a meo auditu remove, quia scio quis sum & qui estis*. Thus Prelacy first conveyed it selfe into opinion, afterwards into conscience, and ambition coming in the reare made it become both Bishop and Lord.

Greg. Epist. ad
Eulog.

CHAP. VII.

Of Metropolitans in the Saxons time.

BEING in pursuit of the government of this Kingdome in belder times, and therein first of the persons with their relation, then of their worke, and lastly of their Courts and Lawes, and now in hand with the Ecclesiasticall persons, I shall descend to their particular ranks or degrees, and shall shew what they were in their originall, and what overplus they had by Lawes. And first concerning the Metropolitan. In his originall his Office was to visite the Bishops, admonish and exhort them, and in full Synod to correct such disorders as the Bishop could not reforme, and in all things to proceed according to the prescript Canon.

Conc. Brit.

Thus witnesseth *Boniface* an Archbishop to an Archbishop of an Archbishop; not according to the practise of the times wherein it was written, but according to the ancient rule. For long before

P. 258.

An. 745.

Mag. cent. 3.
cap. 7.Concil. Brir.
p. 190.

An. 694.

Ant. Brit. p. 55.

before *Boniface* his time Archbishops were swolne beyond the girt of the Canon; and before that *England* was honoured with that ranke of men, Metropolitans were become Metronomians, and above all rule but that of their owne will, and through common custome had no regard to any other; so as if *England* will have them, it must be content to have them with their faults. But the truth is, the dignity or title, which you will, was a plant of that virulent nature that would scarce keepe under-ground in the time of the hottest persecution: for *Steven* Bishop of *Rome* liked the title of universall Bishop. And after a little peace its a wonder how it grew to that height that it had; And no lesse wonderfull that the Saxons gave intertainment to such potentates. Much of whose spirit they might have observed in the entrance of their first Archbishop *Austen*, if God had not given them over to thraldome under that mystery of iniquity, of sinfull man aspiring into the place of God, taught by that Courtly messenger of *Rome*, because they would not stoop to that mystery of godlinesse, God manifested in the flesh, as it was taught in implicity by the rurall Picts and Britons. But this was not all, for because Archbishops were gotten above Canon, which was thought scandalous, therefore they gave as large a power by Canon as the former usurpation amounted unto, and so stretched the Canon to the mind of the man, whenas they should have rather reduced the man to the Canon. The words of the Canon in our English tongue, runne thus: It belongs to the Metropolitan Bishop to rule Gods Churches; to governe, chuse, appoint, confirme, and remove Abbots, Abbottes, Presbyters, and Deacons, and herewith the King hath nothing to doe. And thus though the apparent power of Archbishops was great and unlimited, yet what more was wrapped up in that word *Churches*, onely time must declare; for its very likely that in those daies it was not understood, yet the practise doth not obscurely declare the matter; for before, this Law was established by *Withered* in a Councell wherein *Bertnaldus* Archbishop of *Canterbury* was president, and who was first Primate of *England*. *Theodore* Archbishop of *Canterbury* used such power over other Bishops in ordaining and removing them, as a writ

ter faith, that his rule was no other then *perturbatio* and *impetus animi*; and his carriage towards *Wilfrid* produced as a testimony. But the Metropolitan in England as the times then were, had yet a farther advantage, even over Kings themselves; for there were divers Kingdomes in this Island; and Kings had no further power then their limits afforded them: but there was but one Metropolitan for a long time in all the Saxon territories, so as his power was in spirituals over many kingdomes, and so he became indeed *alterius orbis Pater*; and it was a remarkable testimony of Gods speciall providence that the spirits of these petty Popes should be so bound up under the notion of the infallibility of the Roman chaire; that they had not torne the European Church into as many Popedomes as Provinces. But no doubt God ordered it for a scourge to the world, that Antichrist should be but one, that he might be the more absolute tyrant, and that Kings should bow down their necks under the double or rather multiple yoke of Pope and Archbishops, for their rebellion against the King of Kings.

Malsb. lib. 1.
cap. 2.
Ant. Brit. p. 54.

CHAP. VIII.

Of the Saxon Bishops.

HAd not Bishops been somewhat suitable, the Roman Clergy had not been like it selfe; and it had been contrary to *Austins* principles to have advanced to Bishopricks men better qualified then himselfe. They first ruled the Saxon Church jointly in the nature of a Presbytery till about sixty yeeres after *Austins* time, their pride would not endure together any longer; and it may be grew somewhat untractable under the Metropolitan, that resolved to be prouder then all; and thereupon *Theodore* Archbishop of *Canterbury* first divided his Province into five Diocesses, and by appointment of the Kings and people placed Bishops over each, every one of them being of the right Roman stampe, as himselfe was of the right Roman shaving. And it had been a wonder if Episcopacy now

Ant. Brit. 52.
Concil. Brit.
133.
Ant. Brit. 54.
Ibid. 53.

Concil. Brit.
238, 246, 161.

Mag. Cent. 7.
cap. 7.

Bed. hist. lib. 4.
cap. 3.

Concil. Brit.
196.
An. 697.

Ibid. 319.
An. 816.

Concil. 8. gen.
constant. can.
14.

Mag. cent. 3.
cap. 9.

for the space of three hundred yeeres degenerated, and thus into such a monstrous shape as a Pope should by transplanting become regenerate into their originall condition of meeknesse and humility. But its much greater wonder that they should become so purely ambitious as not to endure a thought of the waies of sobriety, but would be proud by Law; to let all the world know that they held it no infirmity but an honour. For albeit that in the first time the Bishops work was to instruct and teach, to see the service of God to be diligently and purely administered in publique congregations; to exhort, reprove, and by teaching to amend such matters as he should finde in life and doctrine contrary to Religion: and accordingly they carried themselves meekly and humbly, studying peace and truth, and meddled not with secular affaires: they are now grown up into state, and must now ride on horse-backe that were wont to goe on foot preaching the Word; and must be respected above the ranke of ordinary Presbytery: none must doubt of their truth, nor question their words, but they must be holden sacred as the word of a King, *sine juramento fit irrefragabile*. Their presence must be a Sanctuary against all violence; all Clerkes and religious houses must stoop under their power; their sentence must be definitive: and thus advanced they must keep state, viz. not go too farre to meet Princes in their approach, towards them, nor to light off their horses backs to doe Princes reverence at their meeting: because they are equall to Princes and Emperours; and if any Bishop shall behave himselfe otherwise, and after the old rustical fashion, (for such are the words of the Canon) for disgrace done to their dignity they must be suspended: so as by their own confession Bishops henceforth are Bishops of a new fashion, that must incurre a note of infamy, for shewing any gesture of humility to Princes: which if any man will see more fully, let him peruse the Canon if he please. But this is not subline enough; they must be not onely equall, but in many respects superiour to Princes: for in matters that concerne God, *Omnia bus dignitatibus præsent*; and more plainly, Princes must obey them, *Ex corde cum magna humilitate*; and this was allowed of by Offa the great in a legatine Synod. And thus highly advanced

ced Bishops are now consecrated to any worke, and make every thing sacred. Oathes taken before them are of highest moment; and therefore the triall of crimes before them, and the acknowledgement of deeds of conveyance in their presence are without controll. Their custody is a sufficient Seale to all weights and measures, which they committed to some Clerke whom they trusted; and at this day (though a Lay-person) beareth title of Clerke of the market. And although anciently they might not *interesse secularibus*; yet afterwards it became a part of their Office to assist Judges in secular causes, to see that justice be not wronged: and had the sole cognisance of all causes criminall belonging to the Clergy, their tenants or servants; and in their Synods their power reached to such crimes of Lay-men as came within the favour of the Canon, though it were but in the cold sent, as the Lawes of *Athelstane* and other his successors sufficiently set forth. And thus dressed up let them stand aside, that roome may be made for their traine.

Concil. Brit.
182.
An. 693.
Ll. Sax. cap. 37.
An. 928.
Ll. Ethelr.
cap. 13.
Concil. Brit.
Concil. Brit.
p. 197.
An. 697.

CHAP. IX.

Of the Saxon Presbyters.

THESE follow their Lords the Bishops as fast as they can hunt; for being of the same Order (as the lesse proud times acknowledged) they would not be under foot, and the others above the top. True it is, that the Bishops loaded them with Canons, and kept them under by hard worke, under the trick of Canonickall obedience: yet it was no part of their meaning to suffer them to become vile in the eyes of the Laity; for they knew well enough that the Presbyters must be their bridles to lead and curb the people; and their eyes to see whether the winds from below blew faire or foule for them; whose consciences already told them that they merited not much favour from the people. They see it therefore necessary to inhaunce the price of a Presbyter somewhat within the aloye of a Bishop; to the end that the Presbytery may not be too like the Babylonian

Concil. Brit.
p. 576.

Concil. Brit.

p. 448.

Ll. Ethelst. 32.

Ibid. 496.

Concil. Brit.

p. 271.

Ll. Ethel. c. 21.

Ll. Canut. c. 11.

Mag. c. 18.

cap. 9.

mian Image whose head was Gold, and feet of Iron and Clay. A Presbyter therefore they will have to be of equall repute with a Baron; and his person shall be in repute so sacred, as that all wrong done thereunto must be doubly punished with satisfaction to the party, and to the Church. His credit or fame must not be touched by lay-testimony. Nor is he to be judged by any secular power; but to be honoured as an Angell. Such are these instruments of the Bishops government; and these are put as a glasse between the Bishops and people, and could represent the people to the Bishop black or white, and the Bishop to them in like manner, as they pleased; and so under fear of the Bishops curse kept the people in awe to themselves, and it.

CHAP. X.

Of other inferiour Church-officers amongst the Saxons.

Deacons.

Sub Deacons.

Acolites.

Exorcists.

Concil. Brit.

p. 54.

Lecturers.

Ostiarics.

They had other inferiour degrees of the Clergy, which because they are meerly subservient, and not considerable in Church-government, I shall onely touch upon them. The first are called Deacons, which were attending upon the Presbyters to bring the offerings to the Altar, to read the Gospell, to baptize, and administer the Lords Supper: Then follow the Subdeacons who used to attend the Deacons with consecrated vessels, and other necessities for the administering of the Sacraments. Next these Acolites, which waited with the Tapers ready lighted while the Gospell was read, and the Sacrament consecrated. Then Exorcists, that served to dispossesse such as are possessed by the Divell, an Office (as it may seem) of little use, yet very ancient; for they are found at the Synod at *Arles*, which was within three hundred yeeres after Christs death. Lecturers come next, who served to read and expound; and these were of use when Churchies began to multiply, and Presbyters grew idle. Lastly, Ostiarics; which used to ring the bells, and open and shut the Church-doores.

These are the severall ranks of Church-officers, being seven

in number (for Bishops and Presbyters make but one) and might be (as thus orde'ed) the seven heads of the beast whereon the woman sitteth; and with much adoe make up a kind of Church-service somewhat like a great Hoe in a ship-yard at the stirring of a little log, and are neverthelesse well payd for their labour.

Concil. Brit.
261.
An. 750.

CHAP. XI.

Of Church-mens maintenance amongst the Saxons.

I Take no notice in this account of the Abbats and Priors, & other such religious men, as they were then called; nor can I passe them amongst the number of Church-governours or Officers, being no other then as a sixt finger, or an excrescence that the body might well spare, and yet they sucked up much of the blood and spirits thereof. But as touching the maintenance of those formerly mentioned; who had a constant influence in the government of the affaires of the publique worship of God; and regard of the salvation of the soules of the people; I say their maintenance was diversly raised, and as diversly imployed: First, through the bounty of Kings and great men, Lands and Mannors were bestowed upon the Metropolitan and Bishops, in free almes; and from these arose the maintenance that ascended up in abundance to the higher Region of the Clergy, but came againe in thinne dewes scarce enough to keep the husbandmans hope from dispaire; otherwise had not the Prelates so soon mounted up into the chaire of pompe and state, as they did. I say, these are given in free almes, or more plainly, as almes-free from all service: and this was doubtlesse soon thought upon (for it was formerly in president with their heathenish Priests and Druids; as *Cæsar* noteth, that they had *omnium rerum immunitatem*;) yet with the exception of works of publique charity and safety, such as are maintaining of high waies, repairing of bridges, and fortifying of Castles, &c. and hereof the presidents are numerous. The worke whereto this wages was appointed was the worship of God, and increase of

Con. 6a

M. Paris in vit.
Eadrick. Abb.

An. 1009.
Concil. Brit.
523.
Ll. Ætheld. 31.

First-fruits.

Concil. Brit.
p. 185.
An. 693.
Concil. Brit.
p. 545.

Tithes.
Concil. Brit.
p. 298.
An. 787.

Concil. Brit.
259.

Ingulfus.

Geft. pontif.
Lib. 2. cap. 2.

of Religion; and thus not onely many of the Kings Subjects were exempted from publique service, but much of the Revenue of the Kingdome formerly imployed for the publique safety became acquitted from the service of the field, to the service of the beade; the strength of the Kingdome much impaired, and the subjects much grieved; who in those early times saw the inconveniences, and complained thereof to their Kings, but could not prevaile. This was the vintage of Kings and great men, but the gleanings of the people were much more plentifull; (for besides the Courts which swelled as the irregularities of those times increased, and thereby enriched the cofers of that covetous generation, the greatest part whereof ought by the Canon to goe to the publique) the best part of the settled maintenance, especially of the inferiour degrees, arose from the good affections of the people, who were either forward to offer or easily perswaded to forgoe constant supply for the Church-men out of their estates as well reall as personall, especially in the particulars ensuing. The most ancient of all the rest was the First-fruits, which was by way of eminency called *Cyrick-sceate*, or in more plaine English, Church-fee; which was alwaies payable upon *St Martins* day unto the Bishop out of that house where the party did inhabit upon the day or Feast of the Nativity. It was first granted by Parliament in the time of King *Ina*; and in case of neglect of payment or deniall it was penall eleven-fold to the Bishop besides a fine to the King, as was afterwards ordered by *Canons*.

After the first fruits commeth to consideration the Revenue of Tithes, whereof I finde no publique act of state to warrant till the Legatine councill under *Offa*: although the Canon was more ancient. The Bishop at the first was the generall receiver as well of these as of the former, and by him they were divided into three parts, and imployed one to the poore; another for the maintenance of the Church; and a third part for the maintenance of the Presbyter. But in future times many acts of state succeeded concerning this, amongst which that grant of *Athelwolve* must be a little paused upon. Some writers say that he gave the tenth mansion, and the tenth of all his goods: but *Malmesbury* saith, the tenth of the hides of Land; but

but in the donation it selfe, as its by him recited, its the tenth manſion. But *Math. Westm.* understands that he gave the tenth part of his Kingdome; but in the Donation by him published it is *decimam partem terre mee*. In my opinion all this being by tradition, little can be grounded thereupon. The forme of the Donation it selfe is uncertaine and varions, the inference or relation more uncertaine and unadvised; for if the King had granted that which was not his owne, it could neither be accounted pious or rationall. Nor doe we finde in the donation that the King in precise words gave the Land, or the tenth part of the Land of his Kingdome; but the tenth of his Land in the Kingdome: and the exemplification published by *Math. Westm.* countenanceth the same, albeit the Historian observed it not; but suppose that the Kingdome joyned with the King in the concession, and that it was the course to passe it onely in the Kings name, yet could not the tenth Hide, tenth Manſion, or tenth part of the Kingdome be granted without confusion in the possessions of the people; for either some particular persons must part with all their possessions, or else out of every mans possession must have issued a proportionable supply, or lastly a tenth part of every mans possession, or house and land, must be set forth from the rest: or some must lose all and become beggars, to save others: all which are to me equally improbable. Neverthelesse I doe not take the thing to be wholly fabulous, but may rather suppose that either a tenth was given out of the Kings own Deniesnes, which is most probable; or else the tenth of the profits of the Lands throughout the Kingdome; and that it was by publique act of State, and that clause forgotten by Historians. And thus might a good president be led to *Alfred, Athelstan*, and other Kings, who seeked Lawes under payment of penalties, and appointed the times of payment, viz. the small Tithes at Whitsuntide, and the great Tithes at Alhollantide.

Another Tribute was that of Luminaries. which by *Alfred* and *Gustabrun* was first settled by Law although it had been before claimed by Canon. It was payable thrice a yeere, viz. Hollantide, Candlemas and Easter, at each time a halfe penny upon every Hide of Land, and this was under a penalty also.

Another

An. 854.

Concil. Brit.
p. 392.
An. 905.
Ibid. 527.
An. 1009.

Luminaries.
Concil. Brit.
p. 377.
Ibid. 545.
An. 1032.

Ploughalmes.

An. 905.

An. 1009.

*Souleshot.*Concil. Brit.
d 571.

An. 1009.

*Glebe.*Concil. Brit.
250.

An. 750.

Peterpence.

Concil. Brit.

p. 230.

An. 725.

Concil. Brit.

p. 311.

An. 791.

Ibid. 343.

An. 847.

Ibid. 621.

Another Income arose from the Plough, and under the name of Plough-almes: at the first it was granted by *Edward* the Elder generally, and the valew was a penny upon every plough; and in after times it was ordained to be payd fifteen daies after Easter.

Next comes a fee at the death of the party, which was commonly called Soul-shot: and payd (before the dead body was buried) unto that Church where the dead parties dwelling was; so as they never left paying and asking so long as the body was above ground; and its probable turned into that fee which was afterward called a mortuary.

The incumbent also of every Church had Glebe laid to the Church; besides oblations, and other casuall profits, as well arising from houses bordering upon the Church, as otherwise. All these four last were payable to the Priest of that particular Congregation, and had not their beginning till Parishes came to be settled.

Lastly, the zeale of the charity of *England* was not so cold as to containe it selfe within its own bounds: they were a dependent Church upon *Rome*, and their old mother must not be forgotten. An Almes is granted, for under that lowly title it passed first, but afterwards called *Romescot* or *Romesfeogh*, or *Heord-penny*; for it was a penny upon every hearth or chimney, payable at the Feast of *St Peter, ad vincula*; and therefore also called *Peter-pence*; it was for the Popes use; and was settled under great penalties upon the defaulters. It arose by degrees and parcels: for first *Ina* the Saxon King granted penny out of every house in his Kingdome: after him *Off* granted it out of every dwelling house that had ground then to occupied to the yeerely valew of thirty pence, excepting the Lands which he had purposed for the Monastery at *St Albans*: This *Off* had a much larger Dominion then *Ina*, and was King over three and twenty shires: after whom *Aibelm* passed a new grant thereof out of his whole Kingdome, which was well nigh all that part which was called Saxony, with this proviso neverthelesse, that where a man had divers dwelling houses, he was to pay onely for that house wherein he dwelt at the time of payment. Afterward *Edward the Confessor*

for confirmed that Donation out of such Tenements as had thirty pence *vive pecunie*. If then it be granted that the Saxon subjects had any property in their Lands or tenements, as no man ever questioned, then could not this charge be imposed without the publique consent of the people; and then the assertions of *Polidore* and the Monks, who tell us that *Ina* and *Offa* had made the whole kingdome tributary to *Rome*, must needs be a mistake, both in the person, and the nature of the gift, seeing there is a much more difference between an Almes and a Tribute then between the King and the people. Now that it was an Almes and not a Tribute, may appeare, for that the originall was a suddaine pang of zeale, conceived and borne in one breath, while the King was at *Rome*; and therefore not imposed as a Tribute. Secondly, it was *ex regali munificentia*, and therefore free. Thirdly, it was expressly the gift of the King; for the Law of *St Edward* which provideth for the recovery of the arreares of this money, and enjoyneth that they must be payed to the King, and not to *Rome*, as it was in the daies of *Cannus*, and *Edgar*, rendereth the reason thereof to be, because it was the Kings Almes.

Vit. Off. 19.

Concil. Brit.
p. 445, 545.
Concil. Brit.
p. 611.

Secondly, that it was an Almes onely from the King, and out of his own Demesnes, may seem not improbable, because it was *ex regali munificentia*, which could never be affirmed if the gift had been out of the estates of others. Secondly, it was granted onely out of such houses as yeelded thirty pence rent, called *vive pecunie*, because in those times rent was payd in Viſtuall; so as it may seem that onely Farmes were charged herewith: and not all mens Farmes neither; for the generall income will never answer that proportion. The particular hereof I shall in brieſe ſet forth. It appeareth in the former quotation that *Offa* charged this leavy upon the inhabitants dwelling in nine severall Diocesses, viz. *Hereford*, which contained the City and County adjacent. 2. *Worcester*, containing the Cities and Shires of it and *Gloucester*. 3. *Leicfield*, containing *Warwickshire*, *Cheshire*, *Staffordshire*, *Shropshire*, and *Darbyshire*. 4. *Leicester*, with the County adjacent. 5. *Lincolne*, with the County adjacent. 6. *Dorchester*, whereto belonged *Northamptonshire*, *Buckinghamshire*, *Bedfordshire*, *Huntington-*
G *shire*,

shire, Cantabridgeshire, and halfe Harifordshire. 7. London, with Essex, Middlesex, and the other halfe of Harifordshire. 8. Helmbam, with Norfolke. 9. Domuck or Dunwich, with Suffolke. In which nine Diocesses were two and twenty shires. And he further granted it out of Spatingbenshire (now Nottingham) whose Church belonged to Torke. But in Eibelwolfes time the grant was enlarged and extended into fifteen Diocesses; which together with their severall charge out of the English Martyrology I shall particularize, as followeth:

For Martyr.
p. 340.

| | I. | s. | d. |
|------------------|------|-----|----|
| Cantuar. Dioces. | 07. | 18. | 0. |
| London | 16. | 10. | 0. |
| Roffen | 05. | 12. | 0. |
| Normic. | 21. | 10. | 0. |
| Elienum | 05. | 00. | 0. |
| Lincoln | 42. | 00. | 0. |
| Cistrens | 08. | 00. | 0. |
| Winton | 17. | 06. | 8. |
| Exon | 09. | 05. | 0. |
| WVigorn | 10. | 05. | 0. |
| Hereford | 06. | 00. | 0. |
| Bathon | 12. | 05. | 0. |
| Latisburgh | 17. | 00. | 0. |
| Coventree | 10. | 05. | 0. |
| Ebor | 11. | 10. | 0. |
| <hr/> | | | |
| | 200. | 06. | 8. |

The whole sum whereof not exceeding two hundred pounds six shillings and eight pence, will not amount to seven hundred pounds of now currant money, if the weight of a penny was not lesse in those times then in the reigne of *Edward* the first, when it was the twentieth part of an ounce, and that the twelfth part of a pound, as by the statute thereof made may appeare. Nor can the difference be much (if any) in regard of the vicinity of the time of this extract to that of the Statute: for though no particular date thereof appeare, yet it seemeth to be done after the translation of the See from *Therford* to *Normich*, which was done in *WVilliam Rufus* his time; and

and after the erecting of the Bishoprick of *Ely*, which was in the time of *Henry* the first. Now albeit this charge was in future times diversely ordered and changed; yet upon this account it will appeare, that not above eight and forty thousand and eighty houses were charged in this time of *Edward* the second with this assessment; which is a very small proportion to the number of houses of husbandry in these daies, and much more inferiour to the proportion of houses in those times, if *Polydore's* observation be true, that in the Conquerours time there were sixty thousand Knights fees; and as others, fifty thousand Parishes. It may therefore be rather thought that none but the Kings farmers were charged herewith, notwithstanding the positive relations of writers, who in this case as in most others wherein the credit of *Rome* is engaged, spare not to believe lightly, and to write largely. And thus for their sevenfold Church-officers, we have also as many kinds of constant maintenance. One in Lands and Tenements, and six severall kiads out of the profits and the personall estate, besides the emergent benefits of oblations and others formerly mentioned.

Brit. Antiq.
p.18.

CHAP. XII.

Of the severall Precincts of Jurisdictions of Church-governours amongst the Saxons.

THe Church-officers thus called to the Drumme and payd, are sent to their severall charges, over Provinces, Dioceses, Deaneries, and Parishes, as they could be settled by time and occasion. Before the Saxons arrivall, *London* had the Metropolitane See, or was chiefeft in precedency; for Archbishops the Britons had none. Afterwards by advice of the wise men, *Canterbury* obtained the precedency for the honour of *Austin*, who was there buried. The number of Provinces, and their severall Metropolitane Sees was first ordered by advice of Pope *Gregory*, who appointed two Archbishops in Saxony; the one to reside at *Canterbury*, the other at *Torke*; and

Malm. Gest.
Reg. lib. 1. c. 4.

Bed. hist. lib. 1.
cap. 29.

Malmesb. loco.
citat.

Vit. Off. r.
Malmesb.
Concil. Brit.
133.
Antiq. Brit.
Antiq. Brit.
p 54.
M. Westm.
An. 775.

Ll. Edw. conf.
cap. 31.
Lindwood. l. 1.
de constit. c. 1.

that each of them should have twelve Bishops under them; but this could never be compleated till *Austin* was dead; as by the Epistle of *Kenu'phus* to Pope *Leo* appeareth. Nor then had the Pope the whole power herein intailed to his Tripples Crowne; for the same Epistle witnesseth, that the counsell of the wise men of the Kingdome, ruled the case of the Primacy of *Canterbury*. And *Offa* the King afterward divided the Province of *Canterbury* into two Provinces, which formerly was but one. The Precincts of Diocesses have been altered ordinarily by Kings, or the Archbishops and their Synods, as the lives of those first Archbishops set forth. *Theodore* had divided his Province into five Diocesses, and within a hundred yeeres after *Offa* we finde it increased unto eleven Diocesses.

Diocesses have also been subdivided into inferiour Precincts called Denaries or Decanaries, the chiefe of which was wont to be a Presbyter of the highest note called *Decanus*, or Archpresbyter. The name was taken from that Precinct of the Lay-power, called Decennaries, having ten Presbyters under his visit, even as the Decenners under their chiefe. The smallest precinct was that of the Parish, the oversight whereof was the Presbyters work; they had Abbeyes and other religious houses, but these were however regular amongst themselves, yet irregular in regard of Church-government, whereof I treat.

CHAP. XIII.

Of the manner of the Prelates government of the Saxon Church.

Malmesb. gest.
pontif. lib. 3.
fo. 263.

HAVING discoursed of the persons and precincts, it now befalls to touch upon the manner of the government of the Church by the Saxon Prelates; which was not wrapped up in the narrow closet of private opinion, but stated and regulated by publique Councell, as well in the making as executing of lawes already made; This course was learned from Antiquity, and inforced upon them by a Roman constitution, in the case that concerned Archbishop *Theodore* and *Wilfrid* upon

upon this ground, *Quod enim multorum concilio geritur nulli consentientium ingerat scandalum.* These are most ordinarily called Synods, although at the pleasure of the Relator called also Councils, and are either Dioceſſan or Provinciall, or Nationall, and theſe either particular or generall. The generall conſiſted of all the Biſhops and Clergy; and ſuch was the Synod under Archbiſhop *Dunſtan* called. The Nationall Synods were diverſly called; ſometimes by the Pope, ſometimes by the King, as the firſt moving occaſion concerned either of them. For Pope *Agatho* in a Synod at *Rome* ordered that a Synod ſhould be called in *Saxony* (viz *England*) *Sacroſancta auctoritate & noſtra Synodali unitate*, and many Legatine Synods in ſucceeding times demonſtrate the ſame. That the Saxon Kings alſo called them upon occaſion, is obvious through all the Councils, and needleſſe to inſtance amongſt ſo many particulars. The Provinciall Synods were ſometimes convoked by the King, and ſometimes by the Archbiſhop, and ſometimes joyntly. The Dioceſſan were called by the Biſhop. In the Nationall and Provinciall ſometimes Kings moderated alone, ſometimes the Archbiſhop alone, and ſometimes they joyned together. The Aſſiſtants were others both of the Clergy and Laity, of ſeverall ranks or degrees; and it ſeemeth that women were not wholly excluded; for in a Synod under *Wiſſered* King of *Kent*, Abbatiſſes were preſent and attelled the acts of that Synod, together with others of the Clergy of greater degree. The matters in action were either the making or executing of Laws for government; and becauſe few Lawes paſſed that did not ſome way reflect upon the King and people, as well as the Clergy, the King was for the moſt part preſent, and alwaies the Lords, and others: Yet if the matters concerned the Church in the firſt act, the King though preſent, the Archbiſhop was nevertheleſſe preſident; as it beſell at a Synod at *Cleveshoe*, *An.* 747. and another at *Celchirb*, *An.* 816. And in the reigne of *Edward* the elder, though the Synod was called by the King, yet the Archbiſhop was preſident. Concerning all which it may be in the ſumme well conceived, that the penning of the Councils aforeſaid, either the Clergy (being the pen-men) were partiall or negligent in the ſetting down

Baronus
An. 930.

Malmesb. geſt.
pontif. lib. 3.
p. 163.
An. 680.

Concil. Brit.
p. 191, 310, &
318.

Ibid. 316, 318,
387.

Concil. Brit.
245, 317, 387.

down of the right form; and that the Kings called these Assemblies by instance of the Archbishop, and sometime presided in his owne person, and sometimes deputed the Archbishop thereto.

M Westm.

An. 955, 958.

Concil. Brit.

479.

Ibid. 332.

Ibid. 319, 332.

Concil. Brit.

p. 334.

The executing of Lawes was for the most part left to the Diocesane Synods; yet when the cases concerned great men, the more generall Councils had the cognisance, and therein proceeded strictly sparing no persons of what degree soever; Examples we finde hereof, amongst others, of one incestuous Lord, and two delinquent Kings, *Edmy* and *Edgar*. Nay they spared not the whole Kingdome; for in the quarrell between *Cenulphus* the King and Archbishop *Wilfrid* the whole Kingdome was under interdict for six yeeres space; and no Baptisme administred all that time. Nor were they very nice in meddling with matters beyond their Sphere, even with matters of property; for at a provincially Councell (for so its called) they bore all down before them, even the King himselfe, as in the case between *Cenulphus* the King and the Archbishop of *Canterbury* concerning the Monastery of *Cotham*. The like also of another Synod concerning the Monastery of *Westburgh*: Its true the Lords were present; and it may be said that what was done, was done in their right; yet the Clergy had the rule, and begat the child; and the Lay-Lords onely might challenge right to the name. This concurrence of the Laity with the Clergy contracted much businesse, and by that meanes a customary power, which once rooted, the Clergy after they saw their time (though not without difficulty) turned both King and Lords out and shut the doores after them, and so possessed themselves of the whole by Survivorship. But of this hereafter.

Mag. cent. 8.

cap. 9.

The particular Diocesane Synods were, as I said, called by the Bishops within their severall Diocesses. The worke therein was to preach the word as a preparative; then to visit & inquire of the manners of the Clergy in the worship of God, and of all matters of scandall, and them to correct. These Synods were to be holden twice every yeere, at certaine times; and if they met with any matter too hard for them to reforme, they referred it to the Provincially or Nationall Synod.

CHAP.

CHAP. XIV.

Of Causes Ecclesiasticall.

AS the power of Synods grew by degrees, so did also their worke; both which did mutually breed and feed each other: Their worke consisted in the reforming and settling matters of doctrine, and practice. The first was the most ancient, and which first occasioned the use of Synods. In this Island the Pelagian Heresie brought in the first president of Synods that we have extant; and herein it will admit of no deniall, but in the infancy of the Church the teachers are the principall Judges of the nature of error and heresie, as also of the truth; as the Church is the best guide to every Christian in his first instruction in the principles; but after some growth there is that in every Church and Christian that makes it selfe party in judging of truth and error joynly with the first teachers. And therefore its not without reason that in that first Synod although *Germanus* was called *Judex*, yet the people hath the name of *Arbiter*, and tis said that they did *contestare judicium*. Heresie. An. 446.

Blasphemy was questionlesse under Church-censure, but I finde no footsteps of any particular Law against it: yet in Scotland a Law was made to punish it with cutting out the tongue of the delinquent: but it may be feared that neither the Saxons nor their Roman teachers were so zealous for the honour of Gods name, as to regard that odious sinne; unlesse we should account them so holy as that they were not tainted therewith, and so needed no law. Beda. hist. l. i.

But Apostacy was an early sinne, and soon provided against; the Church-censure was allowed of in Britaine before the Saxons Church had any breath: afterward it was punished by fine and imprisonment, by a law made by *Alfred*, as he provided in like manner for other Church lawes. Blasphemy. Concil. Brit. p. 341. An. 840.

The times anciently were not so zealous for due observance of Divine worship, unlesse by the Churchmen who were the leaders. Apostacy. An. 314. Concil. Brit. 41. Ibid. 376. False worship

- Canon. Ape. ft. cap. 10. ders therein; a forraine Canon was made to enforce that duty long before; but it would not down with the rude Saxons: they, or the greater sort of them were content to come to Church onely to pray and heare the word, and so went away;
- Bed hist. lib. 3. cap. 15. this is noted by that ancient writer in nature of an imputation, as it somewhat else was to be done which they neglected; this somewhat was the masse which in those daies was wont to be acted after the Sermon ended: and its probable that if the Nobles were so ill trained up, the inferiour sort was worse; and yet finde we no law to constrain their diligence: or to speake more plainly, its very likely the Saxons were so resolute in their worship as there was either little need of Law to retaine them, or little use of Law to reclaime them; for in observed in their late Psalter that the Roman Clergy was not more forward to Image or Saint-worship, then the people were backward thereto; and therein shewed themselves the true seed of their ancestors in *Germany*, of whom its observed that they indured not Images, but worshipped a Deity which they saw *sola reverentia*.
- Concil. Brit. p. 306. Sorcery and Witchcraft they had in abomination; yet it was a sinne alwaies in a myst, and hard to be discerned but by the quicksighted Clergy; and therefore it was left to their censure, as a sinne against the worship of God. This *Ethelald* the Mercian King first endowed them with; and they alone exercised the cognisance thereof till *Alfreds* time, who inflicted thereupon the penalty of banishment: but if any were killed by inchantment, the delinquent suffered death by a Law made by *Æthelstan*. And thus by degrees became one and the same crime punishable in severall jurisdictions in severall respects.
- Tacit. Mor. Germ. Concerning perjury, the Prelates had much to doe therewith in future times, and they had the first hint from *Ina* the Saxon King, grant to them of power to take testimonies upon oaths; as supposing that the reverence that men might beare to their persons and functions would the rather over-aw their tongues in witnessing; that they would not dare to falsifie, least the knowing men should espie it, and forthwith give them their doome. But no positive Law allowed them that power of sentence.
- Concil. Brit. 246. An. 745. Ibid. 377. Ibid. 403. An. 928.
- Perjury.
- Ll. Sax. fo. 4.

sentence till *Æthelstan's* law gave it, and upon conviction by the same Law distested the delinquents oath for ever. An. 928.

Sacrilege comes in the next place, being a particular crime meerly of the Clergy mens exemption and naming; for before they baptised it, you might have well enough called it theft, oppression, or extortion. This crime the Prelates held under their cognisance by vertue of that generall maxime, that all wrong done to the Church must be judged by the Church. The first time that I can observe they challenged this power, was by *Egbert* Archbishop of *Yorke* in the seventh Century. Sacrilege.
Concil. Brit.
p. 117.
An. 610.
Ibid. 265.

But nothing was more their own then Simony; and that may be the reason why we finde so little thereof either for the discovery or correcting thereof. All former crimes were in their first act destructive to the Church, but this advantageous; and therefore though the Canons roare loud, yet the execution is not mortall, because its bent against the dignity, and not the gaine; and although the Canon would not that any Presbyter should be made, but presented therewith to some place to exercise his function in, yet it serveth not for those times when men were sent forth rather to make flocks, then to feed flocks. Simony.
Concil. Brit.
263.

And yet the theame of marriage was the best dish in all their entertainment: they had the whole common place thereof with the appurtenances within the compasse of their text, before ever it attained the honour of a Sacrament. It was a branch of *Moses* Law, whereof they were the sole expositours, and so seemeth to be cast upon them by a kind of necessity, as an orphan that had no owner. Neverthelesse a passage in *Eusebius* seemeth to repose this trust in the civill Magistrate: for he relateth out of *Justin Martyr* concerning a divorce sued out by a godly Matron long before the Prelacy got into the saddle; or the Clergy had the power of Judicature: And whereas *Lucius* taxed *Urbicius* the Magistrate for punishing *Ptolomy* who was guilty of no crime worthy of his cognisance in that kind; amongst other crimes enumerated by him, whereof *Ptolomy* was not guilty, he nameth the crimes against the seventh Commandment, intimating thereby a power in Matrimonial
causes.

H the

Beda. hist. Lr.
cap. 27.

Concil. Brit.
219.
Concil. Brit.
p. 417.
An. 944.

Bastardy.

Incest.
Concil. Brit.
p. 392.
An. 905.

Adultery.
Fornication.
Concil. Brit.
p. 558.

the Judge to have cognisance of those crimes as well as others. But the Prelacy beginning to mount, nibbled at it in the second Century, but more clearly in the fourth, when the persecutions were allayed, and men of learning began to feeble their honour; and never left pursuit till they had swallowed the baite, and exercised not onely a judiciary power in determining all doubts and controversies concerning the same; but challenged an efficienciary power in the marriage-making. This garland *Austin* brought over with him, and crowned the Saxon Clergy therewith, as may appeare by his Quere to Pope *Gregory*; and thus the Saxons that formerly wedded themselves, became hereafter wedded by the Clergy; yet the civill Magistrate retained a supream legislative power concerning it, as the joynt marriages between the Saxons, Britons, and Picts doe manifest; for its said of that work, that it was effected *per commune concilium & assensum omnium Episcoporum, procerum, comitum & omnium sapientum seniorum & populorum totius regni & per praeceptum Regis Ine*, and in the time of *Edmond* their King were enacted Laws or rules concerning marriage, and so unto the Lay power was the Ecclesiasticall adjoined in this work.

The Clergy having gained the principall, with more ease obtained the appurtenances; such as are Bastardy, Adultery, Fornication, and Incest. There was some doubt concerning Bastardy, because it trenched farre into the title of inheritance, and so they attained that *sub modo*, as afterward will appeare. The Lawes of *Alfred* and *Edward* the elder allowed them the cognisance of Incest; although neverthelesse the civill Magistrate retained also the cognisance thereof, so far as concerned the penalty of the temporall Law. Adultery and Fornication they held without controle, yet in the same manner as the former; for the civill Magistrate had cognisance thereof, so far as touched the temporall penalty: And to give them as much as can be allowed, its probable that in all or most of the cases foregoing they had the honour to advise in determining of the crime, and declaring the Law, or defining the matter; for in those ignorant times it could not be expected from any other.

But how the cognisance of Tythes crept under their wing, *Tythes.* might be much more wondred at, for that it was originally from the grant of the people; nor can a better ground be found by me then this, that it was a matter of late originall; for till the seventh Century the times were troublesome, and no settled maintenance could be expected for the Ministry, where men were not in some certainty of their daily bread. And as it will hardly be demonstrated that this title was ever in any positive Nationall Law before the time of *Charlemaine*, in whose time by a Synod of Clergy and Laity it was decreed that Tythes should be gathered by selected persons, to pay the Bishops and Presbyters: So neither can I finde any Saxon Nationall constitution to settle this duty, till *Alfreds* time, although the Church men had them as a voluntary gift (so far as touched the *quota pars*) for the space of well nigh a hundred yeeres before. But *Alfred* made a Nationall Law under a penalty to enforce this duty, which the Canon could not wring from the Saxons, how dreadfull soever the censure proved. And by this meanes the Church had their remedy by Ecclesiasticall censure for the matter in fact, and also the civill Magistrate the cognisance in point of right, albeit future times introduced a change herein.

Synod Durien.
cap. 7.

An. 785.
Rabban. epist.
ad Hadubrand.

Concil. Brir.
p. 377.

CHAP. XV.

A brieve Censure of the Saxon Prelaticall Church-government.

THis that I have said might at the first view seem to represent a curious structure of Church policy, which might have put a period to time it selfe; but (to speak *sine ira & studio*) the height was too great, considering the foundation, and therefore ever weake, and in need of props. The foundation was neither on the rocke, nor on good ground, but by a ginne serewed to the Roman Consistory, or like a Castle in the ayre hanging upon a pin of favour of Kings and great men. At the first they thought best to temporise, and to hold both these their

Concil. Brit.
p. 254.
An. 747.

Malmesb. gest.
pontif. lib. 3.
An. 680.

Boniface epist.
ad Curbertum.
An. 745.

Concil. Brit.
p. 379.

Concil. Brit.
p. 248. & 253.
An. 747.

strings to their bow: but feeling themselves somewhat underpropped by the consciences of the ignorant people, they soon grew wondrous brave, even to the jealousy of Princes; which also was known so notoriously, that the publique Synods rang that the Prelates loved not Princes, but emulated them, and envied their greatnesse, and pursued them with detraction. And if the Cloth may be judged by the List, that one example of *Wilfrid* Archbishop of *Torke* will speake much. He was once so humble minded as he would alwaies goe on foot to preach the Word; but by that time he was warme in his Archbishopps Robes, he was served in Vessels of Gold and Silver, and with Troops of followers, in such gallantry as his pompe was envied of the Queen. A strange growth of Prelacy in so small a space as eighty yeeres, and in the midst of stormy times, such as then afflicted this poore Countrey: But this is not all, for never doth pride lead the way, but some other base vice follows. I will not mention the lives of the Monks, Nuns, and other Clerks; *Malmesbury* speaks sufficiently of their luxury, drunkenesse, quarrelling and fighting: Others witness thereto, and tell us that the Clergy seldome read the Scripture, and did never preach; and were so grossely ignorant, that *Alfred* the King being a diligent translator of Latine Writers into the Saxon tongue, rendreth this reason, because they would be very usefull to some of his Bishops that understood not the Latine tongue. Nor were the Presbyters of another die; for that King bewailing their ignorance, in his Letter to *Wolfege*, saith, that those which were *de gradu spirituali* were come to that condition that few of them on this side *Humber* could understand their common prayers, or translate them into Saxon; and so few, as I doe not (saith he) remember one on this side the *Thames* when I began to reigne. And the Synod that should have salved all, covers the fore with this Canon call playster, that those of the Clergy that could not say *Domine miserere* in Latine, should instead thereof say, *Lord have mercy upon us* in English. It was therefore a vaine thing for the Clergy to rest upon their works, or title of Divine right. Their great pompe, sacred places, and favour of Kings commended them to the admiration, or rather adoration of ignorant

rant people, and the favour of the Roman chaire unto the regard of Kings; who maintained their interest with the Conclave on the one side, and with the people on the other side by their means; and so they mutually served one another. It cannot be denied but the Pope and Kings were good Cards in those daies; yet had the Prefacy maturely considered the nature of the Saxon government, so much depending upon the people, they might have laid a more sure foundation and attained their ends with much more ease and honour. I commend not the base way of popularity by principles of flattery; but that honourable service of truth and vertue which sets up a Throne in the minds of the vulgar, few of whom but have some sparks of nature left unquenched; for though respect may chance to meet with greatnesse, yet reverence is the proper debt to goodnesse, without which we looke at great men as Comets whose influence works mischief, and whose light serves rather to be gazed upon, then for direction.

The foundation thus unhappily laid, the progresse of the building was no lesse irregular in regard of their ends that they aimed at: For first, they admitted the Laity into their Synods; who were not so dull but could espie their ambition, nor so base spirited as to live in slavery after conviction: This error was espied I confesse, but it was too late; and though they reformed it, yet it was after foure hundred yeeres labour, and in the meane time by the contentions of the Clergy amongst themselves, Kings had first learned so much of their Supremacy, and the Laity so much of their liberty, as they began to plead with the Clergy, and had brought the matter to issue, before the Synod could rid themselves of these Lay Spectators, or rather overseers of their waies and actions. A second error, was the yoking of the Bishops power under that of the Synods. For they had little or no power by the Canon that was not under their controule, neither in admission or deprivation of Presbyters or others, determining of any cause, nor passing sentence of excommunication: and this could not but much hinder the hasty growth of Antichrists power in this Kingdome; nor could it ever be compleated so long as the Synods

Concil. Brit.
260, 263.

Synods had the chiefe power. Neverthelesse the intralled spirits of the Clergy, and terror of the Papall thunderbolt, in continuance of time surmounted this difficulty, and Synods became so tame and easily led, as if there had been but one Divell to rule amongst them all. For if any quick eye, or active spirit did but begin to peep or stir, the Legate *e latere* soon reduced him into ranke, and kept all in awe with a *sub pectore* of unknown danger. A third error, was the allowing of peculiar and exemptions of Religious Houses from ordinary jurisdiction; and this was an error in the first concoction, block in the way of Prelacy, and a clogge to keepe it down. This error was soon felt, and was occasion of much mutiny in the body Ecclesiasticall: but exceeding profitable for Rome not onely in point of Revenue by the multitude of appeals, but especially in maintaining a party for the Roman See, in case the Prelacy of *England* should stumble at the Supremacy of *Rome*. Otherwise it seemed like a wenne upon the body rather than any homogeneous member, and without which certainly the English Prelacy had thriven much better, and the Roman chaire much worse. In all which regards I must conclude that the Prelaticall government in *England* was as like a young Bear not fully licked, but left to be made compleat by time and observation.

CHAP. XVI.

Of the Saxon Common-weale, and the government thereof; and first of the King.

HAVING already treated of the Saxon Church, in order I am now come to the Republique, which in all probability will be expected to be suitable to their originall in *Germany*, whereunto having relation, I shall first fall upon the persons and degrees abstractively, then in their assemblies, and lastly of their Laws and customes. The Saxons in their first state in *Germany* were distributed into foure classes, viz. the Nobles, the free-men, the manumitted persons, and the bond-men.

Under

Under the Nobility, and from them, arose one that was called a King, of whom I shall speake a part: the two last differed onely in the bare liberty of their persons, and therefore may be comprehended under one head, as they were in their originall.

A King amongst the Saxons in probability was anciently a Commander in the field, an Officer *pro tempore*, and no necessary member in the constitution of their state; for in time of peace, when the Common-wealth was it selfe, the executive power of the Law rested much in the Nobility: but in times of warre, and in publique distractions they chose a Generall, and all sware obedience unto him during the war; it being finished, the Generall laid down his command, and every one lived *aquo jure propria contentus potestate*. But in their transmigration into Britaine, the continuance of the war causing the continuall use of the General, made that Place or Office to settle and swell into the condition of a King; and so he that was formerly *Dux* became *Rex*, there being no more difference in the nature of their places then in the sence of the words, the one signifying to lead, the other to governe; so as he that formerly was a servant for the occasion, afterwards became a servant for life, yet clothed with Majesty, like some bitter Pill covered with Gold, to make the service better tasted. Nor was the place more desirable, if duly considered. For first, his Title rested upon the good opinion of the Free-men; and it seemeth to be one of the best Gems of the Crown, for that he was thereby declared to be most worthy of the love and service of the people. Yet was the ground of their election so uncertaine, as a man might imagine that sometimes there appeared more of the will then of the judgement in it; that it might be said to be the more free, for they neither excluded women nor children further then present occasions lead them. The West-Saxons deposed *Seburg* their Queen because they would not fight under a woman; but the Mercians obeyed *Elfred* their Queen, and under her fought valiantly with good successe against the Danes; imitating the custome of the Sitones or Norwegians in *Germany*; as they might borrow it from the Lacedemonians. A custome it was so much the more

Witikum.gest.
Saxon. lib. I.

M. Westm.
An. 672.
M. Westm.
An. 912, 919.
Tacit.
Cragius.

more honourable, by how much it demonstrateth freedom, and that the worth of the people rested not so much in the head, as it diffused through the whole body. And it seemeth to runne in the blood of an English man, even to this day, to be as brave under a single Queen, as under the most valiant King, if not much more: and still to strive to be as famous for the defence of Majesty whereever they set it, as the Britons were of old: Nor were they different in their respect of age from that of the sex; for though after the death of *Edmond*, *Edwin* or *Edgar* were to have succeeded in the Crown by the right of descent, yet the States would not admit them, because they were minors; but the Mercians admitted *Kenelm* a child of seven yeeres old to be their King. They likewise excluded not bastards till the Clergy interposed; for they having wound themselves into the Councels of the Kingdome, procured a constitution to back them in the election of Kings legitimate, &c. Let the Kings be legally chosen by Priests and Elders and not such as are begotten by adultery or incest: Which constitution was made in a Legatine councell, and confirmed by great *Offa*: The rule of their election was the same with that in *Germany*, viz. to elect the chiefeſt out of the chiefeſt family, that is, the chiefeſt for worth, not by descent; yet the honour they bare to their brave Kings who had deserved well, made some honour their posterity, and to chuse their eldest after the decease, and so in time Crownes were taken up by Custom and election often times subsequent was accounted but a ceremony, unlesse the people will dispute the point.

Secondly, this election was qualified under a stipulation or covenant, wherein both Prince and people were mutually bound each to other; the people to defend their King, which the Historian saith was *precipuum Sacramentum*; and the Prince to the people to be no other then the influence of the Law: suitable to that saying of *Aethelstan* the Saxon King, seeing according to your Law allow you what is yours, doe you with me; as if the Law were the sole umpire between King and people, and unto which not onely the people, but also the King must submit. The like whereunto *Ina* the great Saxon King also, No great man, saith he, nor any other in the whole

Mag. cent. 8.
cap. 9.
An. 747.

Tacitus.

Tacitus.

Concil. Brit.
p. 397.

Ll. Inz. Lamb.

King.

Kingdome may abolish the written Lawes. Kings furthermore bound themselves (at their entrance into the Throne) hereunto by an oath; as its noted of *Canutus*, unto whom after *Ætheldred* was dead, the Bishops, Abbats, Dukes, and other Nobles came and elected him to be their King, and sware fealty unto him; and he againe sware to them that *Secundum Deum & secundum seculum &c.* viz. according to the Lawes of God and of the Nation he would be a faithfull Lord to them. Its probable I grant that the *precipuum Sacramentum* formerly mentioned was in the first nature more personall for the defence of the person of their leader whiles he was their Captain because it much concerned the good of the Army, and without whom all must scatter, and bring all to ruine; and this the words of the Historian doe evidence. But the safety of the whole people depended not on him after the warre was done, and therefore the oath tied them not any further; nor did the safety of the people afterwards, when as the Saxons entred this Land so absolutely rest upon the person of the King, especially if he proved unfit to mannage the worke: and therefore the fealty that the people sware to their King, was not so absolutely determind upon their persons, otherwise then in order to the publique weale, as may appeare from the Lawes of the Confessor, who was within thirty yeeres after the reigne of *Æthelstan*, formerly mentioned; The words in English run thus: All the people in their Folkmote shall confesse and create themselves as sworn bretheren, to defend the Kingdome against strangers and enemies, together with their Lord the King, and to preserve his Lands and Honours together with him with all faithfulness, and that within and without the Kingdom of *Britaine* they will be faithfull to him as to their Lord and King. So as tis evident the Saxons fealty to their King was subservient to the publique safety, and the publique safety is necessarily dependant upon the liberty of the Lawes. Nor was it to be expected that the Saxons would endure a King above this pitch. For those parts of *Germany* (whence they came) that had the Regiment of Kings (which these had not) yet used they their Kings in no other manner then as servants of State in sending them as Embassadors and Captaines, as

Mirror cap. 1.
sect. 1.

Wigorn.
An. 1016.

Tacitus.

Ll. Sax. Ed.
cap. 17.

M. Westm.
An. 756, 758.
Wigorn.
A. 755.

Concil. Brit.
340.

if they claimed more interest in him then he in them : and the Historian saith expressly, that amongst those people in *Germany* that had Kings, their Kings had a defined power, and were not *supra libertatem*. And this maxime of State became afterwards priviledged by Sanctuary : for by the growth of Antichrist, not only the Clergy, but even their tenants and retainers were exempt from reach of Kings, even by their own concession allowed of a Law that cut the throat of their undefined prerogative, viz. That if the King defend not his people, and especially Church-men from injury, *nec nomen Regis in eo constabit, verum nomen Regis perdit*. Which Law however it might passe for currant Divinity in those daies, yet its strange it should get into a publique act of State. Nor was this a dead word, for the people had formerly a trick of deposing their Kings (when they saw him peep above the ordinary reach) and this was an easie work for them to doe, where ever neighbouring Princes of their own Nation watched for the wind-falls of Crowns : This made the Monarchicall Crown in this Land to walke circuit into all parts of the Countrey to finde heads fit to weare it selfe untill the Norman times.

Thirdly, the Saxons had so hammered their Kings in their elections, and made him so properly their own, as they claimed an interest not onely in the person of their Kings, but also in their estates, so as in some respects they were scarcely *sui juris*. For King Baldred had given the Mannor of *Maling* in *Sussex* to *Christeburch* in *Canterbury*; and because the Lords consented not thereto, it was revoked, and King *Egbert* afterwards made a new grant by advice of the Lords; which shewed that the Demesnes of the Crown were holden sacred, and not to be disposed of to any other use, though pious, without the consent of the Lords : and herewith concur all the Saxon infeodations, attested and confirmed by Bishops, Abbots, Dukes, and others of the Nobility under their severall hands.

Neverthelesse Kings were not then like unto plumed Eagles, exposed to the charity of the Fowles for food, but had a royall maintenance suitable to their Majesty; their power was double, one as a Captaine, other as a King; the first was first, and made

made way for the second ; as Captaine, their power was to lead the army , punish according to demerits, and according to laws ; and reward according to discretion. As Captaine, they had by ancient custome the whole spoile left to their ordering by permission of the army, *Exigunt Principis liberalitate illum Bellatorem equum, illam cruentam & victtricem frameam :* and they were not wont in such cases to be close handed (*per bella raptus munificentia materia*) the spoiles in these wasted parts of Germany bring little other then horses and armes. But after they came into Britaine, the change of soile made them more fat ; Horses and Armes were turned into Towns, Houses, Lands, and Catrell ; and these were distributed as spoils amongst the Saxon souldiers by their Generals, and this redounded to the maintenance of the State and port of the great men, who were wont to be honoured *non stipendiis sed muneribus* , and the people used *nilro & viritim conferre principibus vel armentorum vel frugum aliquid* ; but now upon the distribution of conquered Towns, Houses, Lands, and Cattell in Britaine a yeerly product of victuals or other service was reserved and allowed to the Saxon kings by the people , as the people allowed to Joshua his Land, *Jos. 19. 49.* so as they needed no longer the former course of Offerings, but had enough to maintaine their Royall port, and great superfluity of Demesnes besides ; as their charity to the Church men does sufficiently evidence : and by this meanes all the Lands in England became mediately or immediately holden of the Crown , and a settled maintenance annexed to the same ; besides the casuall profits upon emergencies, or perquisites of felons or fugitives goods, mines of Gold and Silver, treasure trove, mulcts for offences, and other priviledges, which being originally in the kings were by them granted, and made Royalties in the hands of subjects as at this day.

Tacitus.

Tacitus.

Mirror. 101, 298
 Ll Edw. cap. 14

To the increase of Majesty and maintenance there was an access of power, not to make, dispence with, or alter Laws, but to execute and act the Laws established : and against this power there was no rising up so long as it like an unfettered Arrow gaddeth not at random. Its true the Church men or Prelates checked them often, but could never give them the

Malmesb. gest.
pontif. lib. 3.
gest. Reg. lib. 1.
cap. 4.
M. Paris
An. 1095.

mate. For peace sake Kings many times yeelded much; yet would no King of Saxon principles allow of any Canon that extolled the Clergies authority above that of Kings: and though the placing and displacing of Bishops seemed to be all Ecclesiasticall worke, yet would not the Kings altogether connive: as the examples of *Ina* in placing a Bishop in *Wels*, *Offa* in making two Provinces of one, *Cenulphus* in restoring *Polydorus*, *Edfrid* in deposing *Wilfrid*, and *Edward* the Confessor in making *Robert Norman* Archbishop of *Canterbury* may induce into opinion; and for their own safety sake the Prelats thought it wisdome for them sometimes to stoop to that power that at other times they must be beholding to; and therefore though in Synodicall disputes they would hold with the Canon, yet in matters of action would suite with the occasion, and thereby taught Princes to account of Canons but as Notions; and politiquely to put the honour of Commissioners upon these men: thus the current of both powers passing in one chanell made the people drinke double Beere at once; the turns both of Pope and King were competently served, and these men had the honour of the two-handed Sword; and all seemed composed into a faire compromise. But the Pope dome finding its authority becalmed indured this but as a burden, till Pope *Nicolas* the seconds time, who by the like trick commended all to the Crown, as from the Papall benediction For *Edward* the Confessor upon his foundation of the Abby of *Westminster* sent to the Pope for his allowance, and confirmation of what he had done, or was to doe; and to make way for the more favour sent presents, and a confirmation of *Rome* *scot*: The Pope was so inflamed with such an abundant measure of blessing, as he not onely granted the Kings desire, but also discharged that Abbey from ordinary jurisdiction, made it a peculiar subject onely to the Kings visitation, and concluded his Bull with this horne. *Vobis vero & posteris vestris regibus committimus advocacionem & tuitionem ejusdem loci & omnium totius Anglie Ecclesiarum, & vice nostra, cum concilio Episcoporum & Abbatum, constituatis ubique que justa sunt.* How the King took the conclusion I finde not, but he could never make better use then by way of estoppel unlesse he meained to sacrifice his

Concil. Brit.
p 634.
Ah. 1066,

own

own right as a thankoffering to a shadow, which I finde not that he or his next successors ever did: but as touching the Laity, Histories doe not touch upon any conceit of withdrawing Monarchicall power. Its true Kings had their excesses, yet all was amended either by the body of the people, when they pleased to examine the matter, or by the Princes faire compliance when complaint was made, and so the Law was saved. And thus upon all the premises I shall conclude that a Saxon King was no other then a *primum mobile* set in a regular motion, by Lawes established by the whole body of the Kingdom.

Ll. Canut.
cap. 67.

CHAP. XVII.

Of the Saxon Nobility.

THe ancient Saxon Nobility in *Germany* were the chiefest in action both in war, and in peace. That ranke of men was continued by three means, *viz.* by birth or blood, by valour, and by wisdom: the first was rather at the first a stemme arising out of the first two, then a different degree or kind: for Noble blood was at the first innobled by brave actions, afterward continued in their honour to their posterity, till by as base courses it was lost, as it was gained by worthy achievements; these were called *Adelingsi*. The nobility of action consisted either in matters of war or of peace. Those of peace arose principally from wisdom, which being gained for the most part by much experience, were therefore called *Aldermanni* or elder men. The Nobility of war arose somewhat from valour or courage with wisdom, but more from good successe; for many brave and fortunate Commanders have not been very daring, and the bravest spirits though wise have not been ever honoured with good successe; these were called *Heretochii*. Neverthelesse all these names or titles were used promiscuously in following times, and all called *Nobiles*; but both that and *Duces*, *Satrape*, and *Comites* were all of the Roman

Ll. Edw.
cap. 35.
Nitard. lib. 4.

T. citus.

Tacitus.

Tacitus.

Miror cap. 3.
Sec. 1.

man Dialect, as the former were of the Saxon. Time al-
brought others into this Honourable band, viz. The gre-
Officers of the Kings household, and their attestis are fou-
amongst the Kings charters, amongst the Nobles; And th-
much advanced the price of Kings; for he that is worthy
be not onely Lord above Nobles, but master of some, may by
little curtesie prevaile over all. This flarry Heaven had sever
Orbes: some so high, as in common esteem they were next
Imperiall Heaven, having a tincture of Royall blood, and
the next door to the Throne; Others, though not of so cle
light, had neverthelasse no lesse powerfull influence upon
people, but rather more, by how much more nigher to the
Their power in matters of peace or government of the Co
mon-weale was exercised either collectively or apart and se
rally. In their meetings they ordered the smaller emergenc
of the publike in convocating and directing the people. *minoribus rebus consultant principes.* These *minora* are such
are subservient to the *majora* and *pro hic & nunc* require su
den order touching any particular part or member of t
Common-wealth. At other times they visited their sever
Territories or circuits, hearing and determining matters
controverisie, and executing judgement according to t
known Lawes. *Principes jura per pagos vicisque reddunt.* Y
they had *comites* of the Countrey joyned with them, where
afterward. This was their course in *German Saxony*; but
England the new stemme of Kingly power arising higher th
all the rest sucked much from them, and kept them unde
for the judicary power was in time drawn up into the Reg
order, and the Lords executed the same as deputies from an
under him, designed thereto by Writs and Commissions, a
its more particularly noted of King *Alfred*. The Lords thu
lessened in their judiciary power, carried the lesse authorit
in their votes and consultations. The King was a perpetua
moderator in that worke, and it was no sniall advantage h
had thereby to sway the Votes. Men that are advanced, if the
have any excellency, soon gain admiration; and its a har
thing for one that hath yeilded his heart to admiration, to
keep it from adoration. This hath mounted up Kings to the top
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what t
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for hac
nature
amazed
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had Ki
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times
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King,
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are m
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more then their own ambition, and made them undertake what they ought not, because we esteem more highly of them then we ought. I speak not against due, but undue obedience; for had the Saxon Lords remembered themselves, and the true nature of the authority of their King, they needed not to be amazed at their check, nor to give way to their passion, as they did many times, and advised others to doe the like. Nor had Kings by degrees become beyond controlle and incapable to be advised. This error the Lords espied too late, and sometimes would remember their ancient right and power, and did take boldnesse to set a Law upon the exorbitancy of their King, as in that case of *Æthelwulf* and his Queen amongst others may appeare: but that was like some enterprises that owe more to extremity of occasion then to the courage of the undertaker.

Concil. Brit.
P. 333.

M. Westm.
An. 854.

CHAP. XVIII.

Of the Freemen amongst the Saxons.

THe next and most considerable degree of all the people, is that of the Free men called anciently *Frilingi* or free born, or such as are borne free from all yoke of arbitrary power, and from all Law of compulsion other then what is made by his voluntary consent; for all free men have votes in the making and executing of the generall Laws of the Kingdome. In the first they differed from the Gauls, of whom it is noted, that the Commons are never called to counsell, nor are much better then servants. In the second they differ from many free people and are a degree more excellent being adjoynd to the Lords in judicature both by advice and power, *consilium & auctoritas adiunt*; and therefore those that were selected to that worke were called *Comites ex plebe*, and made one ranke of free men for wisdom superiour to the rest: Another degree of these were beholding to their riches, and were called *Custodes Pagani* an honourable title belonging to military service; and these were such as had obtained an estate of

Cæf. Com.
lib 6.

Tacitus.

Lamb. in 4.
fo. 72

of such valed as that their ordinary armies were a Helmet, Cote of Maile, and a guilt Sword: The rest of the free men were contented with the name of *Georles* or *Pagani*, viz. runclownes, who neverthelesse were the most considerable part both in war and peace: and had as sure a title to their liberties, as the *Custodes pagani*, or the Countrey Gentlemen had.

CHAP. XIX.

Of the villanies amongst the Saxons.

THe most inferiour ranke amongst the Saxons were that of latter times were called villains; But those anciently divided into two degrees, the chieffer of which were called *Free-lazzi*. These were such as had been free but had purchased their freedome by desert; and though they had escaped the depth of bondage, yet attained they not the full pitch of free men; for the Lord might acquit his title of bondage, but no man could be made free without the act of the whole body. And therefore the Historian saith, they are not *multum supra servos*, or scarce not servants. They are seldome of account in any family, never in any City, in Kingdomes sometimes advanced above the free men, above Nobles. Those are now adaies amongst the number of such as are called copy holders, who have the viledge of protection from the Laws, but no priviledge of in the making of Laws.

Tacitus,

The most inferiour of all were those which were anciently called *Lazzi* or slaves; those were the dregs of the people, wholly at the will of their Lord to do any service, or undergoe any punishment; and yet the magnanimity of the Saxons was such as they abhorred Tyranny: and it was rarely amongst them, by beating, torture, imprisonment, or other hard usage, to compell them to serve; they would rather treat them as enemies; and this wrought reverence in these Lords towards their Lords, and maintaintd a kind of generos-

Tacitus.

their minds, that they did many brave exploits, and many times not onely purchased their own freedome, but also brought strength and honour to the Kingdome. And though the infolency of the Danes much quelled this Saxon Noblenesse, yet was it revived again by the Confessors Laws which ordained that the Lords should io demeane themselves towards their men, that they neither incurre guilt against God, nor offence against the King; or which is all one, to respect them as Gods people and the Kings subjects. And thus much of the severall degrees of men amongst the Saxons, being the materials of their Common-weale; a modell whereof in the making and executing of the Laws and manner thereof, now next ensueth.

CHAP. XX.

Of the grand Councell of the Saxons called the Mickle-mote.

IT was originally a Councell of the Lords and Free men; afterwards, when they assumed the title of a Kingdome the King was a member thereof, and generally president therein, but alwaies intended to be present, though actually and in his own person by emergent occasions he may be absent, and sometimes by disability of his person he be unmeet to Vote or be President in such an assembly; as it was in the Councell at Glano or Cleve in Wiltshire, when the great case between the Monks and married Priests was concluded; the King was absent, as the story saith, because of his minority, and yet if writers say true, he was then in the sixteenth yeere of his age. The Lords were also neverthelesse in the same condition of privilege as formerly, and though it appeareth that the Kings had gotten the privilege of summoning the grand meeting in his own name, yet it was by advice of the great men, and being met their votes were no other in value then as formerly; for all their Laws were *ex consilio sapientum*, and for ought can appeare out of antiquity the vote of the meanest continued as

Tacitus.

Malmesb.
gest. Reg. lib. 2.
cap. 9.
Lib. 5.
An. 978.

K

good

Tacitus,

good as of the greatest, *arbitrium est penes plebem*. And thus the *Micklemore* or *Wittagenmote* of the Saxons in England continued in the King, Lords, and Free men by the space of one hundred and fifty yeeres, and in some parts of England nigh two hundred yeeres before ever the Roman Bishops foot entered, or the Roman Clergy crept into the Councils of State. Afterwards the Prelates were admitted *de bene esse*, for advice, a *sapientes*, and continued by allowance; how Canonically *viderim*, for I understand it not, especially as the Scripture was then expounded, *Nemo militans Deo implicet negotiis secularibus*; yet if they be allowed (what in those daies they ordinarily took up) a degree of policy above devotion, that knot is also soon untied. I say they entered as *Sapientes*, not as Prelates, or Church-governours; for then they had holden the same power in Church-matters agitated in the *Wittagenmote* that they had usurped in that Synod which they held onely for Church-visitation, which they could never have because the *Sapientes regni* had their Votes therein as freely as they. Nor could the Prelates by any Law entitle themselves to such power or privilege, so contrary to the privilege of the *Wittagenmote*. For though it be true that the German Priests had liberty to be present in these grand assemblies, and to have some presidency therein, as to command silence, &c. yet in no title to these, unless they will interest themselves as their successors, to possess by a *jus Divinum* that *jus Diabolicum* (which those Priests formerly had) in a way of immediate providence; somewhat like the possession of the mantle of *Elijah* found by *Elisha*. They might, I grant, plead the title from Kings; but it must be granted also that Kings as yet had no more power over the Church then in the Common-wealth. Nor could they have that from the Lords which the Lords never had, but was ever accounted amongst the *majora*, and of which the *Wittagenmote* had the onely cognifance, as it will appear in some particulars ensuing.

Unto the King, Lords, and Clergy must be added; as I said, the Freemen, to make up the *Micklemore* compleat; and though it be true that no monument of story speaks of this grand meeting from theirs being in Germany, untill after the coming

Tacitus.

ming

ming of *Austin*; yet when as the Saxon Histories then finde them in the same condition that the German story leaves them; its very probable that in the intervall they continued their wonted custome, although they had no Learning to leave monuments thereof unto the world. And hereof the examples are not rare in those remembrances that those ancient times have left us. For within six yeeres after *Austins* arrivall *Æthelbert* calls a Common-councell *tam cleri quam populi*. Ina after him made Laws *suasu & instituto Episcoporum omnium senatorum & natu majorum sapientum populi; in magna servorum Dei frequentia*. *Alfred* after him reformed the former Lawes *consulto sapientum*. After him *Æthelstan* called a Councell, in which was the Archbishop, and with him the *Optimates & sapientes frequentissimi* besides others, whereof I shall treat now that I come to the matters handled in this Court.

Concil. Brit.
126.

Ll. Sax. Lamb.
cantab. fo. 1.
Ibid. fo. 22.
Ibid. fo. 53.

The matters in agitation in the *Witagenmot* generally were all both of publique and private concernment. That which concerned the publique were such as regarded removall of inconveniences, such as are lawes for leagues and affinity with other Nations for preventing of war; and thus became the Saxons and Britons united, and the mortall feude between those two Nations laid aside; and they made one; and the Saxons and Danes reconciled by a covenant agreed unto, and sworne between both Nations. The like also may be said of their making of warre of defence against foraine invasion. Matters of publique and generall charge also were granted in that assembly; as the payment of Tythes, its said they were granted *Rege Baronibus & populo*. Such also as concerned the Church; for so *Edwin* the King of *Northumberland* upon his marriage with a Christian Lady, being importuned to renounce his Paganisme, answered he would so doe; if that his Queens Religion should be accounted more holy and honourable to God by the wise men and Princes of his Kingdom. And all the Church Lawes in the Saxons time were made in the *Miklemote*. Monasteries were by their generall consent dedicated, & their possessions confirmed. The City of *Canterbury* made the Metropolitane matters also of private regard were there proceeded upon, as not onely generall grievances, but perverting

Concil. Brit.
p. 219.
Ll. Lamb.
Cantabr. fo. 36.

Ll. Edw.
Lamb. Cant.
fo. 139.

Antiq. Brit.
p. 51.

Concil. Brit.
117.
Ibid. 321.

Ibid. 332.

Cap. I. Sec. 3.

Sec. 2.

Cap. 4. Sec. 11.

Tacitus.
Plut. Lycurg.
Thucyd. lib. 1.
de Lacedem.

Tacitus.

An. 1238.

of justice in case of private persons : as in that Councell called *Synodale concilium* under *Beornulfus* the Mercian King *questum est quomodo quis cum justicia sit tractatus, seu quis injuste sit spoliatus*. The name of which Councell called Synodall mindeth me to intimate that which I have often endeavoured to finde out, but yet cannot, *viz.* that there was any difference between the generall Synods and the *Wittagenmoot* unlessse meerly in the first occasion of the summons. And there be any credit to be allowed to that booke called, *The Mirror of Justices*, it tels us that this grand assembly is to conferre of the government of Gods people, how they may be kept from sinne, live in quiet, and have right done them according to the Customies and lawes; and more especially wrong done by the King, Queen, or their children; for the King may not by himselfe or Justices determine causes wherein himselfe is actor; and to summe up all, it seemeth Court made to rise and stoop according to occasion.

The manner of debate was concluded by vote, and the law taken in the grosse by noise; like to the Lacedemonians; who determined what was propounded *clamore non calculis*; when the noise was doubtfull, they tooke the votes severally. The meeting of the Saxons at this assembly in the first time was certaine, *viz.* at the new and full Moon. But Religion changing, other things changed these times to the Feasts of Easter, Pentecost, and the Nativity; at which times they used to present themselves before the King at his Court, for the honour of his person; and to consult and provide for the faires of his Kingdome; and at such times Kings used to man shew of themselves in their greatest pompe, Crowned with their Royall Crown. This Custome continued till the time of *Henry the second*, who at *Worcester* upon the day of his Nativity offered his Crown upon the Altar, and so the ceremony ceased.

This grand Assembly thus constituted was holden sacred, and all the members, or that had occasion therein, were under the publique faith both in going and comming, unless the party were *fur probatus*. If a member were wronged, he delinquent payed double dammages, and fine to the King, by

Law made by *Æibelbert* above a thousand yeeres agoe. This priviledge of safe passe being thus ancient and fundamentall, and not by any law taken away, resteth still in force. But how farre it belongeth to such as are no members, and have affaires neverthelesse depending on that Court, I am not able to determine; yet it seemeth that priviledge outreacheth members: unlessse we should conceit so wide that the state did suppose that a member might be a notorious and known thiefe.

Lastly, this assembly though it were called the *Wittagenmot*, or the meeting of wise men; yet all that would come might be present and interpose their liking or disliking of the proposition, *si displicuit sententia fremitu aspernatur, si placuit frameas concutiant*; and some hints I meet with that this course continued here in England; for some presidents runne in *magna servorum Dei frequentia*, as that of *Ina: commune consilium seniorum & populorum totius regni*: another Councell by him holden. The councell of *Winton*, *An. 855.* is said to be in the presence of the great men, *aliorumque fidelium infinita multitudine*. And it will appeare that it continued thus after the Norman times: what power the vulgar had to controll the vote of the wise men, I finde not; *fremitu aspernabantur* its said, and probably it was a touch of the rudenesse of those times; for it was not from any positive Law of the Nation, but a fundamentall Law in nature that wise men should make Lawes: and that the supream judicature should rest in the *Wittagenmot*, was never an honour bestowed upon it by the Saxons, but an endowment from the light of reason, which can never be taken away from them by that headlesse conceit *provoco ad populum*, but that body must be as monstrous as the *Antrophagi* whose heads are too nigh their belly to be wise.

Concil. Bar.
p. 127.
Ll. Canut.
p. 2. cap. 79.
Ll. Edw. cap. 35

Ll. Sax. Lamb.
p. 1.
Concil. Bar.
219.
Ingulfus.

CHAP. XXI.

Of the Councell of Lords.

THis in the first condition was a meeting onely of Lords for direction in emergent cases, concerning the government and good of the Common-weale; and for the promoting of administration of justice: these the Historian call *Minors*, because they were to serve onely the present passion of State. Afterwards when they had gotten a King into this number, they had so much the more worke as might concern due correspondency between him and the people, and of themselves towards both. This worke was not small, especially in those times of the growth of Kings, but much greater by the access of Prelates into their number, with whom came all a glut of Church affaires, that continually increased according as the Prelates ambition swelled, so as this Councell might seem to rule the Church alone in those daies; when a few motions that any way concerned Church-men, but were resolved into the Prelaticall cognisance, as the *minora Ecclesie* and thus under the colour of the *minora Ecclesie*, and the *minora Reipublice*, this mixt Councell of Lords came by degrees to intermeddle so farre in the *magnalia Regni*. For this meanes the worshipping of Images; and the masse was intruded upon the Saxons by the Roman Bishop and his Legate and the Archbishop of *Ganterbury*; and decreed that no Temporal or Lay person shall possesse any Ecclesiasticall possessions. That elections of Ecclesiasticall persons and officers should be by Bishops. That the possessions of Church-men shall be free from all Lay service and taxes. And in one summe they did a thing that bound not the whole body of the Free men. which had these Lords reflected more upon the office, and less upon the person, and not at all upon their private interest. they doubtlesse had been a blessing to their generations, and the Golden Scepter in the hand of a righteous King; but contrarily missing their way they became a Sword in the Kings hand againe.

Mag. cent. 8.
cap. 9.
An. 712.
Concil. Brit.
p. 189.
An. 694.

against the subjects, a snare to the Kingdome, and had not the *Wittagenmot* in their meeting allayed those distempers, the Saxon government had been little other then a Common-weale reversed.

CHAP. XXII.

Of the manner of the Saxon Government in time of warre.

AS the condition of States or Kingdoms are diversly considered in warre and peace, so also must their government be: for however warre in it selfe be but a feaverish distemper in a Common-weale, yet in some cases it is as necessary as a kindly ague in due season is for the preservation of the body which many times takes distemper rather from the excellency of its constitution then from the abundance of humours. Nor did the temper of the Saxon Common-weale ever shine more then in warre, whiles it set a law upon that which ordinarily is master of all misrule and confusion, and so fought by rule rather then by passion. Their chiefe in the first times was chosen by the Freemen in the field, either at the *Wittagenmot* or the *Folkmot*, according to the extent of his command, being carried upon a shield borne upon their sholders like as now Knights of the shire are. This Emblem they entertained him with, to declare their trust in him, and the worke that was expected from him. His first Title was *Heretock*, afterwards he was called Duke or *Dux*; the latter whereof turned to a bare Title in the conclusion; but the former maintained its owne honour, so long as the name lasted. After his election all sware to be at his Order, and not to forsake him: this was a trick of insinuated times; for though the Lacedemonian Law was positive, that none should flie or breake his ranke, but get the victory or die, yet were they neither bound by oath or penalty: shame in those times being accompted worse then death by those brave minds. But times growing more old grew also more base-spirited, and could not (drawn into the field) be holden.

Tacitus.
Ll. Edw. c. 13.

Tacitus.

Ll. Sax. Lamb.
Cantab. 10.

Concil. Brit.
p. 528.
An. 1009.

Tacitus:

Ll Edw. cap. 35

Ll. Canut.
cap. 58.

holden in ranke by oathes or honour; and this occasion
that Law of *Ina* the Saxon King that in such case a Countie
Gentleman should be fined 120 shillings if he were landed, but
if otherwise, 60 shillings, and the Yeoman 30 shillings, and
afterwards the penalty was increased to the forfeiture of
the estate of the delinquent. In their warres they went forth
bodies collectively as they were united by the law of pledge
this made them stick close together for the honour of the
families and friends, and rendered their encounters mortal
and to the worsted party commonly fatal: for once beaten
the field they could hardly recover either by rallying or gathering
a new Army. Probable it is that the Lords might have
their villaines to follow them in the battaile, but the strength
consisted of the free men; and though many were bound
tenure to follow their Lords to the wars, and many were
luntiers, yet it seems all were bound upon call under peril
fine, and were bound to keepe Armes for the preservation
the Kingdome, their Lords, and their own persons, and that
they might neither pawning nor sell, but leave them to descend
to their heires, and in default of them to their Lord, and in
default of him to their chiefe pledge, and for want of such
the King. They mustered their armes once every yeere both
Townes and Hundreds, viz. the morrow after Candlemas;
and such whose bodies were unfit for service were
to finde sufficient men for service in their stead. They
were strict in their discipline, if they followed their rule which
was made not by the arbitry of the Generall, but by Parliament.
These amongst other scattered principles concerning
Sea-affaires, may serve to let us know that the Law-Martiall
and that of the Sea were branches of the positive Lawes of the
kingdome, settled by the generall vote in the *Wittagenmoot*,
not left to the will of a lawlesse Generall or Commander;
tender and uniforme were those times both in their Lawes
and liberties.

CHAP. XXIII.

Of the government of the Saxon Kingdome in times of peace; and first of the division of the Kingdome into shires, and their Officers.

IF the Saxon government was regular in time of warre, how much rather in time of peace? All great works are done by parcels and degrees, and it was the Saxons ancient way in *Germany* to divide their Territory into severall circuits or circles, and to assigne to each their severall Magistrates, all of them ruled by one Law; like one soule working in severall members to one common good. Thus they did here in *England*, having found the Land already divided into severall governments; they likewise what they conquered divided into severall parts called *Comitatus* or Counties, from the word *Comes* that signifies a companion; and the Counties thence called are nothing but societies or associations in publique charge and service. But the Saxon word is shire or share, that is a portion or precinct of ground belonging to this or that person or great Town, and bearing the name of that person or Town; and sometimes of the scituation of the people, as North or South folke, East or South Sex or Saxons. This division by the names seems to be of Saxon originall, and though by the testimony of *Ingulfus* and other writers, it might seem to be done by *Alfred*; yet it will appeare to be more ancient, if the reader minde the grant of *Peter-pence* made by King *Offa*, wherein is recorded the severall Diocesses and shires out of which that grant was made under the very same names that they own at this day: and that grant was more ancient then *Alfreds* time by the space of 80 yeeres.

Each of these Shires or Counties had their two chiefe Governours for distributive justice; of these the Sheriffe was more ancient and worthy Officer, being the Lieutenant, and ayded by the power of the County in certaine cases: for his Com-

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mission

Seld. Tit. Hon.

M. Westm.
An. 794.

Sheriff.

Ll. Edw. c. 35.

mission extended not to leavy warre, but to maintain Justice in that County, and within the same; and in this work he was partly ministeriall and partly judiciall: in the one he was the Kings servant to execute his Writs; in the other he regulated the Courts of justice under his survey. He was chosen in the County Court called the *Folk-mote*, by the votes of the Freeholders, and as the King himselfe and the *Heretock* were intituled to their honour by the peoples favour.

Coroners.

Miror cap. 1.
Sec. 13.

Miror p. 300.

Fitts N.Br.
163, 164.

The Coroner though in originall later, was nevertheless very ancient: he was the more servant or Officer to the King, of the two. His worke was to enquire upon view of manslaughter, and by indictment of all felonies as done *contra coronam*, which formerly were onely *contra pacem*, and triable onely by appeale. As also he was to inquire of all escheates and forfeitures, and them to seize. He was also to receive appeales of Felonies, and to keep the rolls of the Crown-pleas within the County. Its evident he was an Officer in *Alfred* tyme; for that King put a Judge to death for sentencing one to suffer death upon the Coroners record, without allowing the delinquent liberty of traverse. This Officer also was made by election of the Freeholders in their County Court as the Sheriffe was, and from amongst the men of chiefest ranke in the County, and sworn in their presence, but the Kings Writ lead the worke.

CHAP. XXIV.

Of the County Court, and the Sheriffs Torne.

Folk-mote
or
County court.

THe government of the County in times of peace consisted much in the administration of justice, which was done in the publique meetings of the Freeholders: & their meetings were either in one place, or in severall parts of the County: in each of which the Sheriff had the manning of the acts done there. The meeting of the Freemen in one place was called the *Folk-mote* by the Saxons (saving the judgement of the honourable reporter) *Coke inst. 2. p. 69.* and of latter times

times the County court: the work wherein was partly for consultation & direction concerning the ordering of the County, for the safety and peace thereof, such as were redresse of grievances, election of Officers, prevention of dangers, &c. and partly it was Judicall, in hearing and determining the common pleas of the County, the Church affaires, and some trespasses done therein, but not matters criminall, for the Bishop was Judge therein, together with the Sheriffe, and by the Canon he was not to intermeddle in matters of blood: yet neither was the Bishops nor Sheriffs worke in that Court, other then directory or declaratory; for the Free-men were Judges of the fact, and the other did but *edocere jura populo*; yet in speciall cases upon petition a Commission issued forth from the King to certaine Judges of *Oier* to joyn with the others in the hearing and determining of such particular cases. But in case of injustice or error the party grieved had liberty of appeale to the Kings Justice. Nor did the Common pleas originally commence in the County court, unlesse the parties dwelt in severall Liberties or Hundreds in the same County: and in case any mistake were in the commencing of suits in that Court, which ought not to be, upon complaint the Kings Writ reduced it to its proper place; and in this the Kings own Court had no preeminence. In those ancient times this County court was to be holden but twice a yeere by the constitution of King *Edgar*; but upon urgent emergencies oftner, and that either by the Kings especiall Writ, or if the emergent occasions were sudden and important by extraordinary summons of ringing the Moot-bells. Unto this Court all the free men of the County assembled to learne the Law; to administer justice, to provide remedy for publique inconvenience; and to doe their fealty to the King before the Bishop and Sheriffe upon oath; and in the worke of administering justice, causes concerning the Church must have the precedence; so as yet the Canon law had not gotten footing in *England*.

The other Court wherein the Sheriffe had the directory was in the meeting of the free men in severall parts of the County; and this was anciently, and now is called the Sheriffs

Mirror: p. 147.

Ll. Canst.
Mirror: cap. 1.
Sec. 15.

Mirror cap. 5.
Sec. 1.

Ll. Canst.
Ll. Edg. r.

Concil. Brit.
p. 197. tit. 22.

Ll. Edw. cap. 35

Ll. Edw. cap. 35

Ll. Edw. cap. 4.

Sheriffs
Torne.

Miror cap. 1.
Sec. 16.

Ll. Edgar cap. 5
Ll. Edw. cap. 35

Ll. Canut. p. 2.
cap. 17.

Sheriffs Torne; which simply considered is but a Hundred Court, or the Sheriffs Torne to keep the Hundred Court. It was ordered to be kept twice every yeere, viz. at the Lady day and Michaelmas, or soon after: unto this Court all the Freeholders of the Hundred repaired, and there they, the Bishop and Sheriffe executed the same power and worke for kind that they did in the County Court. In this Court all the suits in the Hundred court depending had their determination, and others had their commencement and proceedings as well the pleas of the Crown as others. Some have conceived it to be a County court, or superiour thereto; but there being no ground thereof, I conceive it to be no other then a visitation of the County by parcels or in circuit.

CHAP. XXV.

Of the Division of the County into Hundreds, and the Officers and Court thereto belonging.

Tacitus.

Cluer, lib. 1.
cap. 13.

Counties were too great to meet upon every occasion; and every occasion too mean to put the whole County to that charge and trouble: and this induced subdivisions; the first whereof is that of the Hundred now, and also anciently so called, but as ancient (if not more) is the name *Pagum*; for the Historian tels us that the Germans in the executing of their Lawes, a hundred of the free men joyned with the chiefe Lord *per pagos vicosque*, and in raising of forces one hundred were selected *ex singulis pagis*, which first were called *Centenarii* or Hundreders from their number, but used for a title of honour like the *Triarii*: And as a second hereunto, I shall adde that testimony of the Councell at *Berkhamsted*, which speaking of the reduction of suits from the Kings Court *ad pagi vel loci prepositum*, in other places its rendred to the governours of the Hundred or Burrough. And at this day in Germany their Countrey is divided into circuits called *centen* or *canton* and *centengrieche* and the *Hundredere* they call *Centgraven* or Hundred chieffes, whether for government in time of peace, or for

com-

command in time of warre; the later whereof, the word *Wapentake*; doth not a little favour. Amongst these one was *per eminentiam* called the *Centgrave* or Lord of the Hundred, and thereunto elected by the free men of that Hundred, and unto whom they granted a stipend in the nature of a rent, called *Hundredsettena*, together with the government of the same. The division of the County in this manner was done by the free men of the County, who are the sole Judges thereof, if *Polydore*s testimony may be admitted: and it may seem most likely that they ruled their division at the first according to the multitude of the inhabitants: which did occasion the great inequality of the Hundreds at this day. The government of the Hundred rested at the first upon the Lord and the Hundredars; but afterwards by *Alfred* they were found inconvenient, because of the multitude, and reduced to the Lord or his Bailiffe, and twelve of the Hundred; and these twelve were to be sworn neither to condemne the innocent, nor acquit the nocent. This was the Hundred court, which by the Law was to be holden once every moneth; and it was a mixt Court of common pleas, and Crown pleas: for the Saxon Laws order that in it there should be done justice to thieves; and the triall in divers cases in that Court is by ordeale. Their common pleas were cases of a middle nature, as well concerning Ecclesiasticall persons and things as secular, for the greater matters were by Commission or the Kings Writ removed as I formerly observed: all Freeholders were bound to present themselves hereat. And no sooner did the defendant appeare, but he answered the matter charged against him, and judgement passed before the Court adjourned, except in cases where immediate prooffe was not to be had; albeit it was holden unreasonable in those daies to hold so hasty proccesse: and therefore the Archb. of *Torke* preferres the Ecclesiasticall or Canonick way before this. Lastly, in their meeting, as well at the Hundred as County Court, they retained their ancient way of comming armed.

Malmesb. Reg.
gest. p. 54.

Ll. Alured
cap. 4.

Ll. Edw. 35.
Ll. Ætheldr. 1.
Ll. Æthelst. 20

Ll. Edw. cap. 32

Ll. Ætheldr.
cap. 1.
Lindenbroz.
Ll. Allm. &
Saxon.

Concil. Brit.
p. 273.
Pacrus.
Gloss. 155.

CHAP. XXVI.

Of the Division of the Hundreds into Decennaries.

Ll. Canut. c. 19.

THis was the last subdivision of the County, and that rested upon the persons; and it was either not at all or not so observable as to be worthy of the Roman story; and therefore may rather be thought an extract from *Mosaic* law introduced by *Alfred* or his direction. I say this rested on the persons and not upon the place; for though the Centenners were comprehended with certaine bounds; yet the Decenners were not limited but onely within the limits of the Hundred. And of these also it appeareth to me there were divers sorts; for such matters of controversie that did arise amongst the Decenners, if of greater moment, were referred to the chiefe Justices, which were appointed *super decem decanes*, which I conceive were ten chiefe pledges; and these might beare the names of the Centenners, although they be not the *Centgraves*; and the rather I incline thereto because in all probability there must needs be above one hundred Freeholders in *Hundred*, and all free men were Decenners, that is ranked into severall tens; each one being pledge for others good abearing, and in case of default to answer it before the judge; and in case of default of appearance his nine pledges should have one and thirty daies to bring the delinquent forth to justice. If this failed, then the chiefe of those Decenners by the votes of that and the neighbour Decennaries, was to purge himselfe and his fellow pledges both of the guilt of the fact, and of being parties to the flight of the delinquent. And if they could not this do, then were they by their own oathes to acquit themselves, and to bind themselves to bring the delinquent to justice as soon as they could, & in the mean time to pay the damage out of the estate of the delinquent: and if that were not sufficient, then out of their own estate; but if the delinquents estate was sufficient, the surplussage thereof remained with the pledges. And lastly, the

Master

Master of the family was a pledge for his whole family. This was the Law of Decenners, and may seem to be somewhat a rigorous law, not onely in case of delinquency, but also for their abode, for none of them might depart from their dwelling without consent of his fellow pledges, nor out of the County without allowance of the Sheriffe, or other Governor of the same. And if any controverſie aroſe between the pledges, the chiefe pledge by them choſen, called alſo the Deane or Headburrough may determine the ſame; but this held onely in matters of lighter conſequence.

Ll. Edw. cap. 15
Ll. Canut. c. 28

Ll. Alured
cap. 33.
Ll. Canut. p. 2.
cap. 15.

Ll. Edw. c. 20:

CHAP. XXVII.

Of Franchises: and firſt of the Church Franchises.

WE have hitherto trode in the rode way of the government of the Common-weale: but private regards have made by-paths, which we muſt trace, or elſe the footſteps in many particulars will remaine unknown. Theſe are called exemptions, but more ordinarily Franchiſes, from which ſcarce any part of the Kingdome remained free; and are to be conſidered eithet in regard of the place or perſon. In the later I intend that of the Churchmen, whoſe perſons and eſtates in many particulers were exempted from the civill power of this Kingdom. Their perſons devoted to a peculiar worke, they would have to be under a peculiar Law, called the Canon law; which at the firſt extended onely to their own perſons, and that onely *pro reformatione morum*: for ſo an Archbiſhop tels us, that it did teach *quando Canonici id eſt regulares Clerici vivere debent*: but when it grew to its full charge it gave a louder report, *Quicunque aliquid tenuerit vel in fundo Eccleſie manſionem habuerit extra curiam Eccleſiaſticam non placitabit quavis foris fecerit*. And thus as Church ground increaſed by the blind charity of thoſe times; ſo long Churchmen multiplied, and the Canon enlarged from the perſons of regulers to all Clergymen, and from them to their Tenants and neighbours; from thence to certain Spirituall or Eccleſiaſticall crimes or ſcandals,

Concil. Big.
p. 158.

Ll. Edw. Conf.

Ll. Edw. cap. 7.

scandals, wherever they were found, and wherever it touched, it tooke and bound by Excommunication, and upon *significavit* being first delivered to Satan they delivered him over to the sentence of the Law, to be imprisoned. If the offender be out of reach by the space of thirty and one daies he is outlawed; so as there's no way left to escape the Church fury.

CHAP. XXVIII.

Of the second Franches called the Marches.

FRANCHISES of the place were such as were limited within precincts of place, & annexed thereto; and of this sort first were those of the borders, of which those are the most ancient that bordered the Britons, now called the marches of *Wales*, in which was a peculiar government, so far as concerned administration of justice; for otherwise the subjects each of them submitted themselves to the service of their own Prince. This was therefore a third, different, and mixt government, agreed upon jointly between the Britons and Saxons, who after a long and burdenfome warre, wherein both peoples were well wearied by degrees became friends, entered traffique and into the strictest societies by marriage. Thus finding the sweetness of peace, they provide against future occasions of strife that might arise in commerce by the jostling of two Laws together, & agree in one law, & upon a certain number of Judges elected by common consent, who were to see to the execution of these Laws as joint assessors. From these as I conceive arose those which are now called the Lords marchers, and were at the first twelve in number, *viz.* six Saxons and six Britons. It seemeth this form of government was first instituted by *Æthelred*, and by way of prescription or custome continueth till this day: and as it was the birth of truce, so for the future became both mother and nurse of peace between those two peoples, like the twilight between the day and night, untill both were brought under one head, and by divine providence settled in a lasting day,

Ll. Æthelred.
cap. 3.

CHAP.

CHAP. XXIX.
Of County Palatines.

OF the same sort of Franchises were these which are called County Palatines, which were certaine parcels of the Kingdome assigned to some particular person, and their successors, with royall power therein to execute all Laws established, in nature of a Province holden of the Imperiall Crown: and therefore the Kings Writ passed not within this precinct no more then in the Marches. These were occasioned from the courage of the inhabitants that stoutly defended their liberties against the usurping power of those greater Kings that endeavoured to have the Dominion over the whole Heptarchy, and not being easily overcome were admitted into composition of tributaries; and therefore are found very ancient: for *Alfred* put one of his Judges to death for passing sentence upon a malefactor, for an offence done in a place where the Kings Writ passed not: and the same authour reciting Another example of his justice against another of his Judges for putting one to death without president, rendreth the Kings reason for that the King and his commissioners ought to determine such cases; excepting those Lords in whose precinct the Kings Writ passeth not.

Mirror cap. 5.
 Sec. 1.

CHAP. XXX.
Of Franchises of the Person.

FRANCHISES of the person are such liberties annexed unto the person as are not absolute Lordships, but onely tending thereto, and limited within a Precinct, but not annexed thereto: and these are matters of profit rather then power; as those of *Bury St. Edmonds, Doncaster, Dorchester, Cirester*; all which were in the Saxon times: and these or some of them

Mirror cap. 5.

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had

Infangtheoff.

Ll. Edw. cap. 26

*Outfang-
theoff.*

Bracon lib. 3.

tract. 2 cap. 35.

Briton. cap. 15.

Ll. Edw. cap. 21

Miror cap. 5.
Sec. 1.

had juridicall power in cases of felonies and robberies arising within that precinct, so as the delinquent was both inhabitant and taken within the same; this was called *Infangtheoff*, and if upon fresh pursuit made by the right owner or possessor, the delinquent was taken with the prey in his possession, or as the old Dialect is *Handhaben Backbearend*; Then was he carried immediately before the Coroner of that liberty, and the Sakeber or party wronged made his proove by witnesses; and thereupon judgement forthwith passed without answer, and execution immediately ensued. Some Liberties had *Outfangtheoff*, that is, the triall and forfeiture of such delinquents, being no inhabitants, and yet taken within the liberty, or inhabitants and not taken within the liberties; but this triall was always by Jury. The antiquity of these Liberties are not obscurely manifested in their names, and more clearly by the Saxon Laws and Acts; for its observed of *Alfred* that he seized a Franches of *Infangtheoff*, because the Lord of that Franches would not send a felon (taken within his liberty for a felony committed without the same) to the gaole of the County, as he ought to have done. Other Liberties there were granted also by charter; a taste whereof may be seen in one grant made by King *Edgar* to the Monastery of *Glastenbury*, wherein was granted *Sack, Hamsockne, Friderbrece, Forstel, Teme, Flemon, Ferdre Hundred Setene, Sock, Tholl, Ade, Horda, Busan Orderan, Ben Orderan*, the particular natures of each may be observed in the Glossaries; All of them being allowed to the Crown by the Law, and by the advice of the Councell of Lords granted over to these Grantees in nature of Deputies to the King, to possess both the power and profit thereto belonging.

CHAP. XXXI.

Of *Manors*

NEverthelesse most of these liberties, if not all of them were many times granted by Kings as appendent to Manors; which were Franchises of smaller circuit being at the first portions of ground granted to some particular persons, and by them subdivided and granted over to particular persons to hold of the Grantors by rents, services, and suit to one Court, all being no other then the spoiles of warre, and rewards of valour, or other service. These in their collective nature are called a Manor, and by continuance of time become a kind of body politique. In antiquity its called *Mansum* from the mansion house, although it is not of the Essence of a Manor, nor ought the words of *Bracton* to be construed according to the literall sense; for the house may be destroyed, and yet the Manor continue; and the ground was granted in tenure before any house built thereupon. The quantity of the ground thus given to hold by service was according to the pleasure of the Lord more or lesse, and therefore might extend into divers Parishes, as on the other part one Town might comprehend divers Manors. The Estate that was granted depended partly on the condition of the Grantee: for some were *servi* or bondmen, and their Estate was altogether at the will of the Lord, as was also the benefit; but the servants merit, and the Lords benignity concurring with some conscience of Religion, as the light grew more cleare, abated the rigour of the tenure into that which we now call Copyhold. Other Estates were made to the Freemen, which in the first times were onely for yeers; albeit therein they were not nigardly, for they sticke not at Leases for a hundred yeeres, yet with a render of rent, which in those daies was of Corn or other Victuall; and thence the Leases so made were called *Feormes* or *Farmes*, which word signifieth Victuals: But times ensuing turned the victuall into money, and terms of yeers

Bracton. fo. 212

Fleta. lib. 4.
cap. 15.Ingulfus
Croyl.

Gloss. 158.

Ll. Saxon. 16,

17. Lamb.

Gloss. 348.

Ll. Canut. p. 1.
cap. 69.Knight-
service.

Tacitus.

Tacitus.

Selden, Scipil.

to terms of life and inheritance, retaining the rents, and those called Quit rents, or the rents of those persons that are acquitted or free. But in case of estates of inheritance for the most part after the death of the Tenants were reserved Heriots or a reliefe: which were not left to the will of the Lord, but was put in certainty, in the very letter of the Law: for according to each mans degree, such was his reliefe or heriot.

But over and above all, they reserved speciall service to be done by the person of the Tenant, or some other by his procurement, of which those that were their *servi* or villains were at the will of the Lord: others had their particular service set down in their grants. These concerned either warre or peace; the former was afterwards called the service of the Knight or Souldier; the later the service of the Husbandman or Plough. That of the Souldier was the more honourable, and suitable to the old German trade; *Pigrum & iners videtur sudore acquirere quod possis sanguine parare*: and the worke was to defend the Kingdom, the Lords person and honour; and to this end he was ever to have his weapons in readinesse, which gave name to the service, and altered as times and customes changed. This service by custome from a worke degenerated into the bare Title, and became a dignity; and the men named, or rather entituled *Milites*: and many of the Saxon charters were attested by men bearing that Title; yet the service it selfe was farre more ancient, and called *servicium lorice*, of which sort also were the *Custodes pagani* that wore a Helmet, a coat of Maile, and a guilt Sword: not unlike the old German way of calling forth of their *Tirones* to the war. Of this ranke some were more eminent then others; for some bare the single title of Knight, and it seemed served on foot: Others served on horseback, and were called Radknights, or Knights riders, as *Brañton* noteth; and these I take to be the *Vavasours*, noted in the Conquerours Laws: for that their reliefe is a Helmet, a Cote of Maile, a Shield, a Speare, and a horse. Now for the maintaining of this service, they had Lands and Tenements called Knights Fees, which bound the owner to that service, into whose hands soever they came, to be done either by the person of the owner or other fit person by him procured and

and therefore were discharged from the payment of all taxes and tollage, which was the Law of the Goths of old; and remains in Sweden at this day. The number of these Fees much increased, so as in the Conquerours time they were above sixty thousand, which was a mighty body for a small Island, and brought much honour to the Nation.

But the profit arose from beneath, I mean from the soccage tenure or service of the Plough, which in the first times was performed by those that were unfit for the service of the wars, either being green and young, or decrepet and aged; and sometimes by the women. But after that the Saxon conquest was at a stop, and that no more was to be gotten by blood, men endeavoured to satisfy their desires by sweat, and turned their Swords into Ploughshares; and thus the Husbandry increased exceedingly, and hath proved the best pillar of the Commonwealth: the nature of this tenure is fully set out by the Reporter, nor can I adde thereto more then the Law of the Confessor concerning these men, *viz.* that no man might trouble them but for their rent, nor any Lord thrust them out of their Farme so long as they do their service; and thus it appeareth that the service became in nature of a condition subsequent begetting an increaser of the Estate, which by continuance wrought an inheritance, and so the Title of Entry was turned wholly into distresses for service not performed; yet the Lord was no looser thereby so long as Heriots, Rents, and Services accrewed unto him.

Co.Litlet. 7.
Bureus.

Soccage
tenure.

Tacitus.

Co.Litlet.fo.
86
Ll. Edw. c. 33.
Spiceleg.
Ll. Edw. c. 33:

CHAP. XXXII.

Of Courts incident and united unto Manors.

BY grants made by Lords unto Tenants already noted, the Lords had power by common right to call their Tenants before them and enquire concerning their payment of rents, and performance of services, which became Courts of constant appointment: of which sort there were two, one for the free men, the other for the bond men; and this brought forth an other

Court-leet.

Miror p. 17.

Lind. gloss.

Albin. hist.

Saxon. p. 72.

F. N. Br. 2.

*View of
Frankpledge.*Miror cap. 5.
Sec. 1.*Court Baron.*

other service, which we call suite of Court. The Court of Free men was holden from three weeks to three weeks, wherein the free men, as in the Hundred and County were Judges of the fact, and from them named, as at this day Court leete, or the Court of the Liti, or such as are manumitted or free men. In this Court all actions or suits between the free men of the same Manor, and within the same arising, were determined; nor could any Court (no not the Kings) intermeddle with such suits before triall had, but by the Lords allowance: And upon this priviledge the Writ of right patent was grounded. But the full nature of this Court is not within my intention, but I must referre the Reader to the Law-bookes. For it was the least part of the worke and power which this Court obtained by continuance of time; in regard that manors exceedingly multiplied, so as no part of the Land was left free; and many one of them extended into divers Decennaries, the Lord obtained great power over them, and had of Kings grants of view of Frankpledge within their severall Lordships; and further power of inquiry and punishing of matters of publique nuisance, and such as were *contra pacem & coronam*; which by custome became annexed unto the Court-leet. The nufances of Copy-holds being done to disherison of the Lord, and not proper for the Court of publique inquiry. The Judge of this Court-leet was the Lord, or his Steward, for the directory part; and the Steward was properly Coroner within the Manor to take presentments, and certifie them to the Coroner of the County. And thus this Court swallowed up much of the power of the Decenners Court in the very infancy, so as we finde no footsteps of any Writ of Right to the Decenners or chiefe pledges, but contrarywise many views of Frankpledge granted to particular persons in the time of *Alfred*: and many things done by the chiefe pledges in the Courts of these Manors, as is to be yett seen in many ancient Court Rols.

The other Court which by common right belonged to the Lords of Mannors was that of the Copyholders, called or rather included under the name of the Court Baron, which albeit it is called in the ordinarily stile *Curia Baronum*, yett not so

so properly as I conceive, and it may be by way of mistake for *Baronis*: for if it were so properly united formerly to the Court of Free men, as *ab excellentiori* it alwaies passed under that name; yet when that Court is omitted and slipt out of the way, the Court of Copyholders that remaineth, improperly retaineth the name of that which is gone. This Court at the first was intended onely for the Lords benefit, and for the Tenants right, as subservient thereunto; I say the Tenants right, not against their Lord for they had no right against him, but against any other they had protection of Law both for themselves and their estates; and as I said before, by custome, or rather light of Religion their persons and estates were considerable, even by the Lords themselves; which also caused a Law to be made *ut sic de suis hominibus agant quatenus erga Deum reatum non incurrant & Regem non offendant*: which law could never be intended of the free holders; for it had been a vain redundancy to have made an especiall Law for that, which was provided for by the known fundamentall Law of the Kingdome, against which a speedy remedy lay by the Kings Writ. And that these men, how mean soever, had even in those daies a kind of property both in Lands and goods; for the Laws, though by their antique language darkned, yet plainly speak *de terra sua & Catallis ejus*; and if the ancient Germans were so generous to their bondmen, surely much rather after their comming into this Island in as much as their service was more, and more necessary in *agriculture*, which could never be performed by the natives, who were not in their own persons conquered although their land was.

Co. Instit.
cap. 57.

Ll. Edw.

Selden. Spicil.
184. cap. 33.

CHAP. XXXIII.

Of Townships and their Markets.

THe next Franchise is that of Towns; this was taken up as a birth of warre and nurse of peace; for their ancestors liked not to dwell in crowds, *ne pati quidem inter se junctas sedes*: it being their trade or pastime to warre upon beasts, when

Tacitus.

when they found no enemies amongst them. This solitudin-
ary custome could not be soon shaken off, and might well
occasion multitudes of Towns in those times (though small
ones doubtlesse) that writers speake of; if true it be that after
the wasting times of the Danes and Normans in the Conque-
rours time were found in *England* forty five thousand Parishes,
and sixty two thousand Villages. Nor was peace lesse beneficiall
to them then they carefull of it; for by continuance of peace,
Husbandry, Manufactures, and Commerce occasioned people
to gather to places commodious for habitation in good soile
nigh navigable Rivers or Havens, and according to their scitu-
ation and trade, so they swelled in multitude or decayed, some
of whom growing more eminent then others, more care was
had of their government and safety; for the later by building
of Wals and Castles, and for the former by setting a Magi-
stracy peculiar to that place or Township; not as so many
Decenners, but as one body consisting of many members;
and thus by custome they grew to be Fraternities, or Corpor-
ations under one Magistrate or head, whom they called Al-
derman; and held a Court of Justice (at the first holden twice
a yeere) which was in nature of a Leet with a view of Fran-
pledge, as may appeare in the cases of *Dorchester*, *Circeter*, and
Doncaster, in *Alfreds* time; and herewith they had publique
markets which served them for their better convenience.

Ll. Canar.
cap. 44.
Miror cap. 5.
Sec. 1.
Markets.

This priviledge of Market was a liberty of publique sale
and trade in commodities that principally concerne the belly
but by common course became a passe for commodities of
every kind almost. Concerning this liberty I shall desire leave
to enterpose this parenthesis ensuing before I proceed in the
intended discourse.

In the first times as every man by common right had pro-
perty in his own goods, so by the same right he had power
to alien them to any person, at any time, in any place, by gift
sale, exchange, or other waies; and that by such alienation
but especially by sale a right was vested in the buyer against
men (saving the Eignee right which was recompenced upon
warranty and recovery in value) and in those daies common
sense taught men to buy or sell, of or to the next neighbor
thi

that would bargain with them : and for want of such occasion to repaire to the next assembly, meeting, or concourse of people, for the sale of such commodities as their neighbourhood would not take off their hands. And thus the greater Towns that had walls or Castles became the greatest Markets, and others lesse ; and this made the neighbourhood of those Towns to repaire thither to buy, as others to sell. But time discovering a double inconvenience herein, viz. that by these lesse publique sales in smaller Villages, where little or no care of right or justice was had (and by which means the word Pagan became a word of reproach) many mens goods by clandestine contracts were lost, and no care had of their recovery ; and (which was yet more prejudiciall to the publique) that the greater Towns appointed for the strength and defence of the Kingdome became ill provided with supply of victuall, either for the present or future ; and what was had for the most part was gotten at the second hand, and higher rate then the Countrey Villages had. The wise men by publique edict laid a restraint of Markets in smaller Villages, and more private places ; and thus the greater Towns having Markets formerly became more publique Markets, not by any new right or priviledge from the Crown (for it neither had such power, nor could have, but upon usurpation) against the common right of such Towns and places of publique defence. This restraint upon the reasons aforesaid, was made first in the Saxon times as may appeare by their Laws, but more clearly declared and confirmed afterwards by the Laws of the Normans, which never gave any new right of Market overt unto those places of publique defence, but onely did inhibit the same in the smaller Villages and private places. In which respect although the Kings of this Nation in future times tooke leave to abolish that restraint which did lie upon some of those more private places for certaine reasons of State ; and so these places became Markets overt which formerly were none ; yet could they never take away that priviledge which nature it selfe cast upon those greater Towns being the very limbs of the Kingdome, without wrong done to common right and the publique good : nor abridge them of that power, but that

they might still use their liberty at times and places within their precinct, as might best conduce with the benefit of the inhabitants of those places, even as any particular free man may govern his own estate as him liketh best. And thus upon the whole matter its to be concluded, that the ancient Burroughs of this Kingdome properly doe not hold their liberty of Market overt by prescription or charter, but by common right, and not as a Corporation made by charter; but as they are a multitude of people anciently gathered together and united, upon whom the strength and wealth of the Kingdome doth or did formerly much more depend then on any of the smaller Villages & open Towns; even as every free man possesseth and useth his proper inheritance and estate without particular priviledge derived from the Crown: nor can the King take away the liberty of Market overt from such places, more then he can take away the liberty of buying and selling from any free man, to whom the Law alloweth a liberty of ownership. This I submit to the censure of the learned in the Law, in regard of the different opinions concerning the same.

This liberty of Township thus made, and the place and people inhabitants thereof being of such consequence in the publique administration, had for their better support and safety liberty of Fortification, and power to charge one another with the maintenance of these Fortifications by an imposition called Burghbote, and held their Tenements under a rent to their Lord or King called Burgage, as they were a body aggregate.

Ll. Edw. cap. 1.
Ll. Æthelst.
cap. 12.
Ll. Æthelst.
cap. 13. Gloss.

CHAP. XXXIV.

Of the Forrests.

BESIDES other prerogatives of the Saxon Kings, they had also a Franchise for wild beasts for the Chase, which we commonly call Forrest, being a precinct of ground neither parcell of the County nor the Diocese, nor of the Kingdome, but

but rather appendant thereunto. This favoured of the old German sport, but by custome turned from sport to earnest. For although in the first times the Saxons were so few, and the Country so spacious, that they might allow the beasts their farme as well as themselves their own; People neverthelesse so multiplied, as of necessity they must intercommon either with Beasts or Fishes: the former whereof, however more cleanly, yet the latter had the surest footing, and was chosen as the least of two evils, rather then for any likelyhood of good neighbourhood: for as nature taught beasts to prey for themselves, so men to defend their owne; and this bred such a fewd between beasts and men, as that Kings doubting to loose their game, tooke in with the weaker; that the world might see the happinesse of *England*, where beasts enjoy their Liberties as well as men. But this was, as it were, by compromise; for it had been very hard to have pleased the free men, who had liberty of game within their own ground by common right, and to preserve the Kings liberty of Forrest coincident therewith, had not the King employed on the one side the power of a Dane that looked somewhat like a Conquerour, and on the other side that which looked as like to the bounty of a King, in allowing liberty of ownership to men inhabiting within the bounds of the Forest, which at the first was set apart onely for the Kings pleasure: and all his wits to make a Law somewhat short of a full freedome, and yet outreaching that of bondage, which we since have commended to posterity under the Forrest charter; and yet for all that it proved a hard matter for Kings to hunt by Law; and the Law it selfe a yoke somewhat too heavy for a Common-wealth to beare in old age, if selfe denying Majesty shall please to take it away.

Ll. Canut. c. 77

CHAP. XXXV.

Concerning Judges in Courts of justice.

THUS farre of the severall Tribes and members of this Commonweale, which like so many Conduit heads derived the influence of government through the whole body of this Island; and in every of which Judiciary power acted it selfe in all causes arising within the verge of that precinct; some of which had more extraordinary triall before the King and his Councell of Lords according as the parties concerned were of greater degree, or the cause of more publique concernment. Examples hereof are the cases between the Bishop of *Winchester* and *Leofstin* in *Ætheldreds* time; and between the two Bishops of *Winchester* and *Durham*, in *Edwards* time: but custome made this Court stoop to smaller game in latter times, and to reach at the practise of the County court, by sending the Kings Writs to remove certaine causes from the cognisance of those rurall judicatories to their sublime determination. And thus became the Councell of Lords as an Oracle to the whole Nation, and the King amongst the rest, as the Priest that many times rendred the answer or sentence of that Oracle in his own sence, and had it confirmed to him by an oath.

Glinvil.lib.6.
cap.6,7,8.

Ll.Edw.cap.16

judicium rectum in Regno facturum & justiciam per concilio procerum regni sui tenturum; so as, though he was the first in view, yet the Councell of Lords was the first in nature, and the Cynosure to direct his tongue and actions.

Mirror cap. 5.
Sec. 1. & ca. 1.
Sec. 3.

From this fountaine issued also streams of judicature into all parts by Judges *itinerant* under the Kings Commission to reforme errours, punish defaults in the ordinary rurall judicatories, and to dissolve hard and knotty cases; and these were occasioned at the instance of the party: and *Alfred* (whose birth this was) sent them forth in way of Association with the Sheriff, Lord of the fee, or other ordinary Magistrate.

CHAP. XXXVI.

Of the proceedings in Judicature by Indictment, Appeale, Presentment, and Action.

FOR the proceedings in courſe the Saxons were wont to begin with matters belonging to the Church, and afterward to ſecular cauſes; In which if the matters were criminall the moſt ancient way of proceeding was by appeale of the party complaining; but afterwards in caſes that concerned damage, injury, or violence done to the body of a man or his eſtate, the King was found to be therein prejudiced, beſides the prejudice immediately done to the ſubject; for a man diſabled in body or eſtate is diſabled to ſerve the King and publique; and upon this ground a way was found out to puniſh the offender by indictment, beſides the ſatisfaction done to the party wronged. The proceedings againſt ſuch delinquents were by attachment of the party, who thereupon gave pledges for his appearance. If the party could not be found, a *fugam fecit* was returned, and that was a conviction in Law, and purſuit was made after the party by huy and cry. If he was thereby taken, the ancient way was that of *Halifax* law; but in later times he was impriſoned, or admitted to baile if the offences were baileable; and if the party bailed made default, or did not abide the triall, his baile ſuffered as principall: If no baile could be procured, the delinquent was impriſoned till he was legally acquitted; but this impriſonment was onely in nature of a reſtraint. If the delinquent was found upon the huy and cry, and would not yeeld himſelfe, he was in repute a common enemy, and (as a wolfe) any man might kill him; as the Law was alſo the ſame in caſe of Utlary. At the time of tryall (if at the Kings ſuit) the delinquent was indicted in this manner by any party preſent: *I, D.C. do ſay for the King, that I. S. is defamed by good men; that he upon — day of — &c. into the houſe and goods of — did caſt fire, and the ſame did burn:*

Indictments.

Lambert.
Ll. Inz. 15.

Ll. Inz: Lam:
fo 7.
Ll. Alured
cap. 6.
Miror: c. 2.
Sec. 24.
Ll. Edw. cap. 4.
Miror p. 255.
Gloſſ. 335.
Miror cap. 5.
Sec. 9 & 10.
Ll. Edw. cap. 7.
Ll. Canut.
cap. 45.
Miror cap. 2.
Sec. 22.

or

Appeale.
Mirror cap. 2.
Sec. 15.

or (if it were for bloodhed) *with a Sword did strike and wound him in the left arme, and that this was done feloniously, or (if the case required) trayterously; and if I. S. deny the same, I will for the King prove the matter against him, as the King ought to do: that is to say, by witnesses, and twelve men. But if the complaint was at the suit of the party, then the prosecutor sued him upon Appeale, in manner following: I. C. appealeth D. H. here present, for that E. father, brother, sonne, or Unkle (according as the case was) to I. C. being in the peace of God, and of our Sovereign Lord the King in the dwelling house of E. at — &c. the said D. H. upon the — day of — in the — yeere of — with a Sword made a wound of two inches long, and six inches deep in the left pappe of the body of the said E. whereof he died; and this was done feloniously and of malice forethought. And if the said D. H. shall deny the same the said I. C. is ready to prove the same against him by his body, as a Monk, woman, or Clerke behooveth to prove the same, that is by Champion; for neither Monke, woman, nor Clerke was by Law to justifie by battaile in their own person. The severall causes of appeale and indictment may be found in the Law bookes, to whom I referre the Reader, it not being within the compasse of this discourse to fall upon the particulars: I shall onely observe the difference between Indictments former and later, and between them and appeales, viz. that appeales are positive accusations in the name of the prosecutor of the fact done by the party appealed; whereas indictments were onely a publication or affirmation of the fame of a fact done by the party indicted, and wherein not guilty pleaded, served onely as in nature of a Quere, to usher in the votes of the free men.*

Concerning the fact secondly the difference between former Indictments from these in these daies, consists in this, that the ancient Indictments were in the name of one man: those of the later sort are in the name of the Jury, and the former were onely of a fame, the later of the fact.

Mirror cap. 2.
Sec. 3.
Presentment.

A third way of bringing controversies unto judgement concerned onely such matters as were of lesse consequence; and these were introduced by way of presentment, in the name on behalfe of the King, in nature of positive accuse of one for a crime

crime first laid down generally, and then asserted by a particular fact, in this manner: *I say, for our Sovereigne Lord the King, that H. here is perjured, and hath broken faith against the King, because whereas H. is or was Chancellor of the King, and was sworn that he would not sell right, or any remediall Writ to any one: yet upon the — day of — &c. he sold to B. a Writ of Attaint, and would not grant the same under halfe a Marke: so as the difference between an Indictment and Presentment in those daies was onely in the degree of crime for which the party delinquent was accused, and in the manner of conclusion of the Presentment, which was without averment.*

The last way of trials concerns such offences that exceed not the nature of trespassse done to a mans person or his goods: and this was by way of Action, and it was to obtaine recompence for dammage sustained. Now because the former were called personall trespassses the Proccesse was by attachment of the person, who thereupon put in baile, or else his person was secured by imprisonment till triall, and satisfaction made; but in the later that concerned the realty, three Summons went forth in the Hundred court; and if default were made, complaint thereof ensued in the County court, and thence issued forth a distringas; and if the defendant still persisted in declining his appearance, the distresse was forfeited, and a summons issued upon the Land; if then the defendant would not appeare, or upon appearance would not give pledges to abide judgement, his whole land was seized for the benefit of the King, the Lord of the Hundred, and complainant, because he had offended against all three. But if the party appeared in former times, he answered forthwith, and judgement passed without delay, as hath been said; unlesse in urgent cases, where the matter was raw, and then it was adjourned, and pledges given by the defendant to the full value, after the custome of the Athenians; and if the defendant made default at the day, his pledges were forfeited. But in after times for better and more advised proceeding the defendant was admitted to his Essoines; yet with a proviso, that no Essoine should be allowed for above fiftene daies: and this was the direction of King

Alfred:

*Miror cap. 2.
Sec. 24.
Action.*

*Ll. Ætheldr.
c. 10.
Ll. Canut. c. 10
Lindenbr. tit.
36.*

Ll Edgar c. 7.

*Miror cap. 3.
Sec. 1.*

In.

Miror cap 3.
Sec. 16.

Lindenbr.
gloss.
Miror cap. 5.
Sec. 1.

In the answer of the defendant he either traversed the matter in fact, or confessed and justified; or confessed and submitted. The first put the matter to the judgement of the free men; the second to the judgement of the Judge; the third to the discretion of the complainant, whereby the defendant generally found mercy, and in case of trespassse rendred lesse dammage. I finde no footsteps in those times of Dilatory pleas: or demurrer, or other delays, unlesse in case of infancy; for the Saxons knew no other age of ability to doe or suffer, but the age above one and twenty yeeres; and in *Alfreds* time a Judge suffered death for passing sentence of death upon one under that age: albeit the Canonists had in those daies brought into custom other ages of ability in matters concerning marriage, although it may well be thought that it requireth no lesse maturity to manage the affaires of a married life, then to discern the nature and difference of manners, especially in case of crime which are contrary to the very light of nature.

CHAP. XXXVII.

Of the severall manners of extraordinary triall by Torture, Ordeale, Compurgators and Battaile.

Torture.

EVidence of the matter in fact, upon triall of causes in the Saxon judicatory sometimes consisted in the pregnant testimony of the fact it selfe; and sometimes in the testimony of some circumstances. The first was an unquestionable ground of conviction; the second was too weake to command the Verdict, although sometimes it perswaded it; and therefore those incompassionate times found out a trick of extorted confession, by torture of the party, following the principles of passion therein, rather then sober judgement: for circumstances are sufficient to irritate the hearts of those that are passionate; and where jeloulie is once entered, there's no place for sparing, be the matter never so untrue: yet I doe not finde any Law amongst the Saxons to patronise this fashion of conviction.

ction, albeit it seemeth it was practised, for *Alfred* the King punished one of his Judges with death for passing sentence upon an extorted confession by torture before the Coroner; and possibly it might be gained from the Lacedemonians, although little to the praise of their Greekish wisdom in that particular. Seeing that in all reason it must be supposed that feare and grieve will enforce flattery upon the tormentor as well as selfe love, draw forth flattery to the benefactor.

A second sort of evidence was that of Ordeale, being also grounded upon a preconceit or suspition: the manner hereof was divers. The thing seemeth to be the birth of the braine of some Church-man who had read of the accursed water. The first mention that I finde thereof was at the Councell of *Ments*, and afterwards in the Councell of *Triers*, but not a footstep thereof in this Kingdome till by *Æthelstan* it was advanced into the degree of a Law; after which time it continued in use well nigh three hundred yeeres. A strange monument of Gods indulgency to an ignorant age thus turning extraordinary to ordinary, for the clearing of innocency; and which is no lesse wonderfull) allowing in those times unto men under nature such a power over themselves, as to adventure against nature. Doubtlesse that man or woman was of a daring spirit that first tried the trick, if he had not a miraculous faith in that promise, *Cum ambulaveris per ignem, &c.* and it shewed mettall in them that followed the example: but the next age grew dull, and men being weary of such bane touches, the Clergy that cryed it up, their successors cried it down, and so devoured their own birth, without any difficulty, other then a bare injunction of a King that had power to command onely such as would obey.

But where fame was yet more slight, and springing rather from want of charity and misapprehension then promising circumstances; men were wont to be contented with a *voier Dire*, or the oath of the party suspected, and the concurrant testimony of other men: the first attesting his own innocency, the other contesting their consciences of the truth of the former testimony; and therefore were, and still are called compurgators: their number was more or lesse, and of greater or

Miror cap. 5.
Sec. 1.
Cragius.

Ordeale.

An. 813.
An. 895.
Ll. Æthelst.
Can. 23.
An. 928.

Isa. 43. 2.

Spicil. Selden.

Compurgators.

Ll. Edm. c. 16.

An. 647.

Ll. Canat.
c. p. 5.**Battaile.**Mirror cap. 2.
Sec. 13.

lesse value, according as the offence or the party suspected was of greater or lesse concernment. This manner of triall was of ancient use, and both it and that of Ordeale under the directory of the Clergy; yet this was the ancients by three hundred yeeres, and first brought into this Nation by the Councell at Berghamsted under Bertwald Archbishop of Canterbury. And it was performed sometimes more solemnly by solemn receiving of the Eucharist, especially if the party suspected was of the sacred Function.

One manner of triall yet remaines which was used both in triall of matters of crime and title; and it is the triall by battaile which was in criminall matters with sharpe weapons, but in titulary matters with blunt weapons. No defendant could refuse battaile offered, but such as were too excellent, as the King; or too sacred, as the Clergy; or too weake, as women, maimed persons, and children; or too inscient, as Idiots and Lunaticks; or too mean, as villains. And as these were not necessitated to answer in battaile, so was no free man compelled to answer them by battaile. This way was an old way, as may appeare by the conclusion of appeales, and seemeth more satisfactory then that of Ordeale; because this rested upon the consciences both of Appellant and Defendant, whereas Ordeale rested onely upon the single conscience of the Defendant, which oftentimes was rather hardy then innocent. And the continuance of this triall in title even at this day shewes that men can away with this, and that there is not evill sufficient in it to eradicate this weed; although it be kept under ground partly because its fatall; and partly because both Scripture and experience shew, that right and victory alwaies doe not concur.

CHAP. XXXVIII:

Of the ordinary manner of triall amongst the Saxons by Inquest.

THe last and most ordinary way of triall was by witnesses (upon travers of the matter in fact) before the Jurors, and their vote thereupon: this made the Verdict, and it determined the matter in fact. In former time questionlesse it was a confused manner of triall, by votes of the whole multitude, which made the verdict hard to be discerned: but time taught them better advice, to bring the voters to a certaine number, according to the Gracian way, who determined controversies by the suffrages of foure and thirty, or the major part of them. But how the number came to be reduced to twelve I cannot conjecture, unlessse in imitation of that rule of compurgators, that ordinarily exceeded not that number. The first law that defined this number was that of *Æthelred* about 300 yeeres before the conquest, *In singulis Centuriis, &c.* In English thus: In every Century or Hundred let there be a Court, and let twelve ancient free men, together with the Lord of the Hundred be sworn that they will not condemn the innocent, nor acquit the guilty: And this was so strictly eyed, that *Alfred* put one of his Judges to death for passing sentence upon a verdict corruptly obtained, upon the votes of the Jurors, whereof three of the twelve were in the negative. And the same King put another of his Judges to death, for passing sentence of death upon an *ignorantus*, returned by the Jury: and a third, for condemning a man upon an Inquest taken *ex officio*, when as the Delinquent had not put himselfe upon their triall.

But the Saxons were yet more carefull of the credit and life of man, for no mans life or credit rested altogether upon the cast of twelve opinions: but first twelve men inquired of the same and ground thereof, which if liked rendred the party under the

Inquest.

Baronius.

An. 675.

Ll. Sax. Lamb.

Mirror cap. 5.
Sec. 1.

Two Juries.

spot of delinquency, and meet to be looked upon as under the suspicion of the Law, who formerly was but under the suspect of some particuler man. And then was a second enquiry of the fact, if the party traversed the vote of Fame. In both which trials the verdict grounded it selfe upon those *allegata* and *probanda* which were before them. The first of these inquiries was before the Coroner, who even in those old daies had the view of bloodshed. The second was had before the Judge of life and death: neither of which could legally indammage the party without the other, unlesse the Judge meant to answer it with the perill of his own person and estate, as it befell in *Alfreds* time, when as a Judge suffered death for passing sentence upon the Coroners onely record, unto which a replication is allowed, as the booke saith; and another Judge had the same measure for condemning one without appeale or indictment foregoing. Where by the way I may note another difference between Appeales and Indictments, in this, that Appeales were and are the more speedy trials then Indictments in as much as the former were but one act, the later two.

Mirror cap. 5.
Sec. 1.

Mirror cap. 2.
Sec. 11.

Medietas
Lingue.

Ll. Ætheldr.
cap. 3. Lamb.

And yet time and experience refined this way of triall into a more excellent condition: For the bloody times of the Saxons first age passing over, and peace arising by degrees, together with the Britons began to *intercomon*, and about the Marches betome a mixt people under a mixture of government and Lawes (as hath been already noted) amongst which one concerned their way of triall of matters in fact by a Jury mixt both of Britons and Saxons, which was settled by a law made by Ætheldred. *Viri sint, &c.* In English thus: Let there be twelve men of understanding in the law, six of them English, and six Welsh; and let them deale justice both to English and Welsh. The equity of this law in future ages spread it selfe into all trials of *Foraigners* in every place throughout this Island. Unto such as stumble at this conceipt, because they are said to be *etate superiores*, and *jure consulti*, I shall onely note thus much. that it is not to be doubted but the worke of Jurors required chiefe men both for experience and knowledge in the customes of those times, to enable them to judge of the matter in fact, and upon whose judgement the life and death

death of the party rested principally : and as probable it is that those Jurors, as they were then chiefe men, so they sate in the most eminent place of the assenbly or court, and were coassessors with the Bishop and Sheriffe who did serve, but onely to advise the rest, and they or one of them to publish the sentence which the Law predetermined : And this chiefe place the Jurors might have possessed at this day, as they doe in Sweden, had the chiefe men holden the service till worthy of their attendance.

But great men grew too great in their own esteem for the service of their Countrey, betaking themselves to serve themselves; and matters of highest imployment were left to those of the meaner condition, who being in their own persons of lesse admiration, were thought unmeet to sit in such eminent places, and so from the bench descended to the floore, as at this day. This delidiournesse of the greater sort made one step further to the full perfection of that Manner of triall both of the persons and estates of the English, which hath been the envy of other Nations, and is called the triall *per pares* or by Peeres. For the pride of the Danes (now growing into one people with the Saxons) not induring such fellowship with the mean Saxon free men in this publique service; and the wise Saxon King espying the danger in betrusting the lives and estates of the poorest sort unto the dictate of these superbient humours; and on the contrary in prostituting the Nobler blood unto the vote of the inferiour ranke of men, provided a third way, and by agreement between him and Gunthorne the Dane, settled the law of Peeres. *Si minister regis, &c.* If a Lord or Baron be accused of homicide, he shall be acquitted by twelve Lords: but if of inferiour ranke, he shall be acquitted by eleven of his equals and one Lord. Thus Gods providence disposed of the pride of men, to be an instrument of its own restraint; for the great men ere they were aware hereby lost one of the fairest flowers of their Garland, viz. the judicature, or rather the masterhip of the life or death of the meaner sort; and thereby a faire opportunity of containing them for ever under their aw. And no lesse remarkable was the benefit that redounded to this Nation hereby, for had

Peeres.

Ll. Alured.

Concil. Brit.
fo. 499.

had the great men holden this power, as once they had it, it might soon have endangered the liberty of the free men, and thereby been destructive to the Fundamentall constitution of the government of this Realme, which consisteth in the just and equall participation of these priviledges, wherein all are equally concerned. This was the triall wherein the people of this Nation were made happy above all other people, and whereby the free men, as they had the legislative power, so likewise had the juridicall; and thereby next under God an absolute dominion over themselves and their estates: for though this course of triall was first applied to matters of crime, yet it soon also seized upon the Common pleas, which for the most part was the worke of main import in the Hundred Court; and suitable hereunto are the prescriptions which are extant in the Law-books of cognifance of pleas, and writs of Assize, &c. from the times of the Saxons, as in that case of the Abbot of *Bury* amongst others doth appeare.

26.aff. pl.24.

CHAP. XXXIX.

Of passing of judgement and execution.

After verdict judgement passed according to the letter of the Law, or known custome; in criminall matters according to the grear nesse of the offence, either for death or loss of member. But if the circumstances favoured the delinquent he was admitted to redemption of life or member, by fine assessed by Letter of the Law, and not left to the Judges discretion. If the crime reached onely to shamefull penance, such as Pillory or whipping (the last whereof was inflicted onely upon bondmen) then might that penance be reduced to a ran some, according to the graine of the offence assessed in the presence of the Judge by the free men, and entered upon the roll, and the estreat of each ran some severally and apart sent to the Sheriffe. This ran some was paid usually unto the King and Lord, and the party indammaged, or his friends, if the case so required; according to the old German rule, *Parti*

Ll.Inz,
Ll.Canut.

Ll.Inz cap.12.

mulctæ

multa Regi vel civitati pars ipsi qui vindicatur vel propinquis ejus

This course opened indeed a way for mercy, but through Tacitus.
corruption a floodgate to wickedness in the conclusion. Of imprisonment there was little use in the eldest times; afterwards it was more used not only to secure the person to come to trial of Law for miscarriages past, but sometimes to secure men against committing of future mischief, especially if it more concerned the publique. I finde but little or no use thereof barely as a punishment, nor would their auncestors so punish their bondmen: *Vinculis coercere rarum est*. In case of debt or dammage the recovery thereof was in nature of *elegit*; for the party wronged either had the offenders goods to him delivered or the value in money upon sale of the goods made by the Sheriffe; and if that satisfied not, then the moiety of Ll. Edw. the lands was extended, and so by moities so farre as was possible, *salvo centenemento*, and when all was gone the defendants armes (which were accounted as the Nether-millstone or stock of maintenance) were last of all seized, and then the party was Ll. Alured c. 1. accounted undone; and cast upon the charity of his friends for his sustinance: but the person of the man was never imprisoned as a pledge for the debt, no not in the Kings case; for Alfred imprisoned one of his Judges for imprisoning a man in that case. One punishment of death they had in cases of crime, Miror. cap. 3. Sec. I. and that was by hanging or strangling; and where the crime was not so great, sometimes ensued losse of member or mutilation; and in many such cases Excommunication pronounced indeed by the Clergy, but determined by the Law, which in the first conception was framed in the wombe of the legislative power in Parliament, as may appeare in many laws there made; nor was there in those times any question made of the cognizance thereof, so long as the Clergy and Laity had charity enough to joyn in all publique Councils.

Concil. Brit.
105, 251, 365,
420.

CHAP. XL.

Of the penall laws amongst the Saxons.

Passing the Courts and manner of proceedings till sentence we are now come to the particular Laws that directed the sentence, and first of those that concerned criminall offences. During the Saxons time the Common-wealth was in its minority, the government tender, the Laws green and subject to bend according to the blast of time and occasion, and according to the different dispositions of governours, ages, and peoples. For though the Saxons were in name our first matter, yet not they onely; but they having once made the breach open, and entered this Island it became a common sewer to the excessency of those Easterne peoples of the Angles, Danes, Almaines, and Goths; as their severall Lawes left with us in power doe not obscurely informe us; and amongst all the rest the Gothes were not the least concerned herein; for the Saxon King determining what people shall be holden Denizens in this Kingdome, saith that the Goths ought to be received and protected in this Kingdome, as sworn brethren, kinsmen, and proper Citizens of this Common-weale. Nor can any Nation upon earth shew so much of the ancient Gothique law as this Island hath. Neverthelesse in this mixture of people of severall Nations, there being a suitable mixture of Laws, as the power of any one of these peoples changed, so likewise did their Lawes change in power; and long it was ere a right temper of one uniforme law could be settled, yet in the interim these short remembrances left unconsumed by time, I have subjoynd, that it may appeare their notions were excellent, though somewhat inconstant in their practice.

Those times were darke, and yet so farre as any light appeared the people were to be honoured for their resolution in the defence thereof. For there was few of the Commandements of the two Tables which they did not assert by Laws by them made,

made, the third and tenth excepted; which latter commands the inward man onely, and whereof God hath the sole cognifance.

True it is that the first Commandement containeth much of the same nature; yet somewhat is visible, and that they bound; for whereas in those times the Divell had such power as he did prevaile with some, and those it may be not a few, to renounce God, and deliver themselves wholly to his owne will; they punished this crime with banishment as unworthy of their society that would communicate with Divels, yet if the delinquent had done any mischief whereby death ensued, the parties punishment was death; yet might all be discharged by ransom, and good security for good behaviour for time to come.

For their worship of God they were no lesse zealous in maintenance of the manner; as their forefathers liked not the use of Images or pictures for adoration, neither did they: and although the clergy in other matters led them much, yet in this they were alone for a long time; for although the Roman Church had the use of Images above three hundred yeeres before *Austins* comming, yet could not that custome fasten upon the Saxons for the space of above one hundred yeeres after *Austins* comming, notwithstanding the endeavours of *Charlemaine* and Pope *Constantine* by his bastard decree begotten upon the dream of the Bishop of *Worcester* that saw the Virgin *Maries* picture brought him in his sleep by her selfe, and with a command from her that it should be set up in the Church and worshipped: I say it could not fasten any constant practise of Idoll worship, nor ever wrest a Law from the *Wittagenmoot* to countenance the same; but rather on the contrary they still preserved the memoriall of the second Commandement in the Decalogue even then when as the Romanists had expunged the same out of the number; and they inforced the same by a law of their own making, so far as their Clergy, or reverence they bare to *Rome* would allow.

It hath been formerly observed that the Saxons tooke no note of the vice of prophane swearing and cursing, which crime (if it were in use, as it cannot be otherwise conceited but it was)

*The first
Commandement.
Witchery.*

Ll. Sax. cap. 6.

*The second
Commandement.*

Concil. Brit.
218.

Concil. Brit.
364
Ll. Canut. c. 5

*The third
Commandement.*

was) as the times then were must lie upon the Clergymen to count for their neglect of teaching the poynt, or upon the generall ignorance of those times, which understood not the Commandement, nor the Scripture. For we finde no Canon against it, nor scarce any doctrine concerning it, but onely in case of false swearing, till *Anselms* time. True it is that *Chrysostome* seemeth zealous against all swearing; but that was his personall goodnesse, which for ought appeareth died with him. And *Anselms* contending against swearing by the creatures, and idle swearing, renders his grounds in such manner as it may be well conceived that he understood not the maine.

Cenz. I, cap. 4.
de lege.

*The fourth
Commandement.*

Tacitus.

Concil. Brit.
445, 446.

Ibid. 268, 277,
404, 518, 546.

*The fifth
Commandement.
Treason.*

Tacitus.

I am the rather induced to conceive charitably of those times in regard of their exceeding zeale for the honour of the Lord day; which sheweth, that so farre as their knowledge would maintaine them they had zeale to make it into action. They began this day doubtlesse as other daies, according to the custom of their forefathers in *Germany*, *Nox ducere diem videtur*. And because they would not allow their secular affaires to trench too nigh that daies devotion, they made the Lords day to begin upon Saturday at three of the clocke in the afternoon and to continue till Munday morning. No pastime, no new their beloved sport of hunting, was allowed during all the time: nor no works were to be done, but such as concerned the worship of God; and those laws they bound with penalty of fine, if the delinquent were a free man; if he were a bond servant, he was to be whipped: Nor were these the Lawes of one King, or age onely, but of the whole currant of the Saxon government, and may, although darke times they were, yet put us in these daies of light to the blush, to enter into comparison with them for their devotion.

In their conversation with men the Saxons seemed yet more strict, and being a people of a publique spirit, they preferred the good of their Countrey above all; accounting treachery against it, or neglect thereof in time of danger to be a crime of the greatest concernment, and to be punished in the highest degree. *Proditores & transfugas arboribus suspendunt*. Other Treason then this, no not against Kings, did they then acknowledge any

any; and therefore the form of the Indictment for contriving the death of their King concluded only *Felonice*, as may appear in that form of an indictment for an offence of that nature intended and plotted against *Edmond* the Saxon King: whereas for the plotting against alliance, though of common and inferior nature, the Indictment concluded *felonice & preditorie*. And whereas the penalty in case of treachery against the Country was death, and forfeiture of the whole estate, both real and personal: in treachery against the King it was only loss of life, and of the personal estate. And therefore it may seem that Majesty had not yet arrived at its full growth; or else that the greatest measure thereof rested in the body still.

If in any thing the Saxons were indulgent, it was in matters of blood; for they were a warlike people, and looked upon it as under the regiment of valour; and therefore it was punished only with fine, according to the old rule, *Lex hominibus homicidii certo armentorum & pecorum numero*. So as even in Germany they had learned the trick to set a price upon that crime; and this they afterward called *Manbotta vera virgida wita* and lashlight: and which was worse, they countenanced that which in after ages was called deadly feuds; and so under colour of punishing murder with revenge, they added blood to blood. But as times grew more tame, and inclining to civility or Religion, the cry of blood was more hideous; and this urged on the Law of appeales, and so private revenge became under the power of the Law: which punished death with death, favouring of such a King as *Alfred* was who first taught the Scriptures to speake in the dialect of our own Laws; like the Rubrick amongst the Canons, bringing therewith both strength and beauty; yet they had degrees of bloodshed, and made a difference in the punishment; for some sprung from sudden passion, but other was forethought and purposed; which last they called *Abere* murder, or murder by foreplot or treachery; and this was made *nullo precio emendabile*; and yet towards the times of the Danes devotion grew of so high a dye that a Sanctuary could represent any bloodshed more allowable, if not acceptable; under the golden colour of recompence made to the King, the Lord of the party slain, and

Mirror cap. 2.
Sec. 11.

Mirror cap. 2.
Sec. 13.

Ll. Edw. cap. 38

Concil. Eborac. 26.

The sixth of
Commandment.

Man-slaughter.
Tacitus.

Sax. Lamb.
fo. 17, 18.

Mirror cap. 5.
Sec. 1.
Ll. Alfred Sax.
proface Lamb.

Gloss. p. 4.
Ll. Canut.
cap. 93.

Tacitus:

Englisbire.

Stamf. lib. 1.

cap. 10.

Mirror cap. 1.

Sec. 13.

Bracton lib. 3.

tract. 1. cap. 15

*Breach of
peace.**Batteries.**Maimes.**Imprison-
ments.*

Alured, præf.

Lam. 19.

Ll. Edw. c. 31.

Ll. Sax. cap. 36.

Ll. Inæ cap. 6.

*The seventh
Commande-
ment.*

Baronus Anal.

745. num. 5.

Concil. Brit.

558.

Ll. Canut. 50.

reg. 22.

the parties friends; for the losse of a subject, a tenant, and a friend, according to that of their forefathers; *recepitque satisfactionem universa Domus*. It would be too tedious to recite all the particular Laws, with their changes, and therefore they shall be left to the view in the severall Laws of *Alfred, Edmond, Canutus* and *Edward*, the Saxon Kings. Yet one custome first begun by the Danes, I cannot omit: That if a man were found slain, whose parents or friends were unknown, by common intendment he was to be presumed to be a Dane, and then if the delinquent were not taken, nor fled to Sanctuary, nor known where he is, the whole Hundred was amerced for the escape; but if the party slain was known to be of English parents, it was otherwise. This custome lasted long after the Normans time, the Dane being onely changed into the Norman, and was called Englishire. Batteries, maimes, imprisonments, and other breaches of peace were punished by fine, which they called *Fightwitt, Gritbrece* or *Fritbreck*; and the delinquent ordinarily put in sureties for the peace for future time; The fine was increased by the number of delinquents joyning in the fact; for if seven joyned, it was a riot, and the fine was then called *Flothbote*. If the number were five times so many, viz. thirty and five, then it was a rebellion or warre. Secondly, the fine was increased by the time or season of the fact, as in Lent, or while the Army was in the field; because, in the first case, the holy time was prophaned; in the second, the Country was more endangered when the strength was abroad, and the Army might be discouraged at the news of the disturbance at home. And therefore the Saxons punished this with death, or fine sutable. Thirdly, the fine was the greater in case of the excellency of the place, where it was holy ground, or in the presence of great persons, such as the King or Bishop.

Adultery amongst the old Germans was holden a crime of a high nature; the penalty of the woman that committed that crime was death. I finde not what became of the man; in latter times of the Saxons it grew lesse penall, and more common. By *Alfreds* Law it was finable, and the fine called *Legierwit*. By *Canutus* the man was fined or banished, the woman to lose her nose, eares, and her portion. Incest was more penall to the

man

man then Adultery, and yet it touched not his life.

Robbery amongst the Lacedemonians was accounted but a trick of youth, the Athenians thoughts were more severe. The Germans likewise differed in their censures concerning it; the Saxons punish it with death, but the Angles with fine onely; yet *Ina* the King made it mortall, and *Canutus* followed him therein: And *Edward* the Confessor limited that punishment to thefts of twelve pence in value, or above, burning of woods was fineable by *Ina*'s law: but Burglary was felony. In King *Edmund*'s time onely the Danes made it finable; possibly being guilty in their own consciences of their own propensity to rapine and plunderings. This priviledge of the dwelling house was anciently called *Hamsoca*, or *Hamsoken*, or *Hamsokne*. Trespasses committed upon ground were all comprehended under the generall name of *Ederbrece*, or hedge-breaking; and the penalty was not onely the dammage to the party, but also fine to the King upon action, which in these daies passeth under the name of *Quare clausum fregit*, according to the words of the Writ. The dammages were more or lesse according to the time or season when it was done; for if when the Army was abroad, the dammages were doubled; and in like manner, if done in Lent time. If the trespassse was done by a beast, the owner must pay the dammages: But if it were occasioned through the complainants default (as through his gap) no dammages were paid. The constant fine to the King in all such trespassses was by *Alfred*'s law set at five shillings. Other actions also were then used as touching dammage done to goods and actions upon the case; for in *Alfred*'s time the Plaintiff recovered not onely dammages for trespassses done to possessions and goods, but also costs for injuries in point of scandall and defamation, in case the complainant specially declareth that he is thereby disabled or indammaged in his preferment and maketh proove of the same suitable unto the forms of our pleadings at this day, which conclude with *per quod &c.* or *& deterioratus est &c.*

The Saxons were utter enemies to perjury: they punished with eternall discredit of testimony; ^a and sometimes with banishment, or with grievous fines to the King, and mulcts ^b to

Incest.

Ll. Sax. 48.

reg. 19.

The eighth

Commande-

ment.

Lind Ll. Ang.

& Sax.

Ll. Sax. 4. reg. 3

Mirror 262.

Burning of

woods

Burglary.

Ll. Edm. cap. 6.

Ll. Canut. p. 59

Trespasses.

Ll. Sax. cap. 36.

Ll. Inz 56.

Ibid. c. 40.

Ll. Sax. c. 36.

Mirror p. 301.

The ninth
Commande-
ment.

^aLl. Æthelst.

c. 10.

^bLl. Canut. c. 6.

Spec. Sax. l. 3,
art. 53.

Ll. Edw. c. 18:

to the Judge. For that difference I finde observed in those daies between fines and mulcts, albeit the more ancient times used them for one and the same; for so the Historian, *pars mulctæ Regi*. In all these matters where any interest was vested in the Crown the King had the prerogative of pardon; yet alwaies the recompence to the party was saved; besides the security of the good behaviour for time to come, as the case required.

CHAP. XLI.

Of the Lawes of property, of Lands and goods, and their manner of conveyance.

Mirror cap. 5.
Sec. 1.

Inheritance.

THUS passing over some tops of Saxon penall Laws, besides the general rule or law of eye for eye, tooth for tooth, &c. it now remains as lightly to glance at a few generals concerning the settling and property of possessions in point of title; Concerning which, although it be true that the conquerours of this part of the Isle were a body aggregate of many Nations or peoples; and so divers customes must necessarily settle by common intendment in severall places, according as they chose their habitation: yet the generall custome of the Germans, as touching discent of inheritance was to the eldest sonne; For Tacitus speaking of the German Cavalry, saith, that the horse of the party dead went not to the eldest sonne *ut cetera*, but to the most valiant man amongst them of that lineage; which words *ut cetera* doe plainly intimate, that other matters of profit passed to the eldest sonne in point of descent; Nor can I conceive how men should be induced to conceit that the custome of Gavelkind was the ancient generall custome of the Germans. Its true the words of the same Historian have misled some; the words are, *Heredes tamen & successores cuique Liberi*; these taken collectively I grant may import somewhat tending that way; but they may as properly be taken disjunctively, that the children inherite by course; and if none such were, then the brothers; if they failed, then the uncles. And

its

its not onely evident that in the publique succession to the Crown they had an eye this way; but in the descent of private and particular estates, as by many instances out of those old Histories may appeare; and had any other custome been generall, *Alfreds* rule by *Moses* Law had never succeeded; nor could that other custome hold out against the constant desire of the Saxons to perpetuate their families in greatnesse and honour: all which besides the expresse laws set forth in the Codes, are in my conceit sufficient to induce an historicall faith that the generall course of descent was to the eldest sons, and not to all joyntly. Neverthelessse out of this estate of inheritance divers particular estates were created, as well by common custome, as by the especiall act of the owner of such estate. Such of them as were wrought by custome was occasioned from marriage, whereby if the man was settled of such estate as formerly hath been recited, and died; his wife surviving, by ancient custome she had her dower or third part of such estate of inheritance. This custome though ancient, yet was not originally from the Germans, but from the Latines, who used to give dower with the man, and receive portion with the woman. But the Germans learned from the Greeks otherwise; for the Laws both of *Solon* and *Lycurgus* forbade the latter, lest marriages should be made for reward; and not grounded upon affection; which, as they conceived, would be a means to maintaine the strength of mankind in generation. And therefore *Tacitus* noteth this by way of Antithesis *Dotem non uxor marito sed uxori maritus offert*. The dower that was given in the first times was goods; and these were utensiles for warre. And the wife many times returned to the man tokens of her love in the same kind, and not as gages of future maintenance, unlesse we shall account warre their proper calling from whence their livelihood issued. Succeeding times growing more calme changed the custome of fighting into trading, and taught them to preferre the stock gotten by commerce, before that of warre, and so the dower was changed. This course continued all the Saxons time, for ought I can finde; for not much above threescore yeeres before the conquest it was by a publique law confirmed, that the Bridegroom be-

Dower.

Plut. vit. Solon.
Apotheg.
Lacon.Lt. Sax. Lamb.
Edm. fo. 76.

fore

Ll.Sax. 50.
Reg. 22.

Ll.Sax. Lam.
fo. 14.

Ll.Inæ cap. 58

Ll.Edm.Lam's
cap. 7.

Ll.Sax. 50.
Reg. 22.

fore marriage should set forth that portion of goods that should be his wives, and these were ever afterward holden her own proper goods. But if no such provision was made before marriage, then the law or custome gave the wife halfe her husbands goods, if she outlived him; and if there were children, then the whole estate in goods, to provide for her selfe and them, untill she tooke a second husband; but if the husband suffered death as a malefactor, the wife was to have but one third part. I finde no footsteps of Dower in Lands untill the Normans time; who were also as well owners of the wives personall estate, as of their persons; and before which time the Saxon wives in divers regards were more absolute and independant: I say not more happy, because they were never one with their husbands; nor were they ever under the Law of free pledge, as wives; nor was the husband his wives pledge as he was her husband; although as a master he was free pledge for his servants: for the Law was, that in case the husband carried his wife away into another Lordship, as he must give pledges that his wife shall have no wrong, so she must give pledge by her friends that she shall do no wrong; and she passed therefore as an appurtenant to her husband, then in unity with him; and her estate or portion was rather appurtenant to her than him: for if she failed in her good carriage to her husband, she was to make amends out of her own estate to her husband; and if her estate sufficed not, then her pledges were to satisfy the husband. Neverthelesse what failed in the relation of the woman to the man, was supplied in the relation of the man to the woman; for besides the respect the men bare to the women, as their wives, they honoured them as German women, that admired valour in all, Idolized it in their husbands, and shared in it themselves; and upon occasion merited thereby not onely to be companions in honour, but triumphers above men, ye their Commanders and governours: Nor was this the originall trick of the rude and uncompt Germans or Barbarous Britons, but of the wife Greeks; and received as may be supposed from the Lacedemonians, upon as good ground as the wife of *Leonidas* the Lacedemonian King rendred, who being asked why the Lacedemonian women ruled their husbands,

bands: Its true, said she, for we onely know how to obey our husbands. A second particular estate, which the Law derived out of the inheritance, was advancement to the husband; for the Saxons were not so stupid as to refuse favour proffered: and therefore they made a law of Counter-tenure to that of Dower which we commonly call tenure by the curtesie of *England*; which was but a perquisite of the wives estate given to the husband, in case he over lived his wife, and had issue by her born alive: The name was probably given by the Normans, who as it seemeth had no such custome; and therefore they gave it the name from the English (albeit since that time *Scotland* hath also allowed it amongst them) who might probably bring it into this Kingdome or Country amongst the mingled people; for this custome or law is found amongst the ancient Almain laws: differing onely from the law this day in the evidence of the title, which now ariseth upon the birth of the child heard to cry; when as in those daies the title vested not unlesse the child opened his eyes *ut possit videre culmen domus, & quatuor parietes*, which toucheth not onely the opening of the eye, but also the rowling of it about.

Curtesie of England.

Ll. Alm. tit. 92.
Lindenbr. cod.

Estates that were derived out of the estate of an inheritance by the act of the party, either were such as concerned the whole inheritance, or part thereof. That which concerned the whole inheritance, was nothing but a parcelling of it out according to the will of the giver; and this was afterwards called estate Taile, which passed also amongst some places by way of custome, as amongst the Angles it was a law that the inheritance should passe unto the issue males on the fathers side, untill the fifth generation, before any title could accrew to the issue female; and then according to their Proverbe, it went from the Lance to the Spindle. But the Danes possibly might prevent this in the continuance thereof; for they brought along with them that which was formerly the Saxon custome, which carried the inheritance unto the daughters, upon the failing of the issue male: as in the example of *Cenedriht* daughter to *Cenulfus* amongst multitudes of others may appeare. But where Lands were conveyed by writing or act of the party, it was a maxime that the will of the conveyor should

Estate taile.

Ll. Ang. tit. 6.
Lindenbr.

Ll. Sax. tit. 7.
ibid.
Concil. Brit.
333.

Ll. Alured.
Sax. c. 7.

Plo. com. 251.
b.

be strictly observed: nor could ever any one that came in by vertue of such writing ever alien the Land to crosse the current of the originall conveyance. The entailing of estates therefore was very ancient, although by corrupt custome it was deluded, as the Lord Dier in his argument of the *L. Derk* case observeth.

Another custome of inheritance was catcht I know not how its called Burrough English, and by that name may seem to be brought in by some Cynicall odde Angle that meant to crosse the world, and yet in a way not contrary to all reason for where nature affords least helpe, the wisdom of men hath used to be most carefull of supply; and thus the youngest became preferred before the elder in the course of descent of inheritance according to this custome. There is no further monument of the antiquity hereof that I have met with, then the name it selfe, which importeth that it sprang up whiles as yet the name of Angles and Saxons held in cognifance: and might arise first from the grant of the Lords to their Tenants and so by continuance become usuall; and by this means also might arise the custome of Copyholds of this nature so frequent, especially in those Eastern parts of this Island where the Angles settled, and from whom that part had the name of the East Angles.

Gavel kind.

Stephanus Dam.
Burgus Suel,

Another custome of descent remaineth, and that is to the children collectively, and its called Gavell kind, or Gave-kind: and by the very name seemeth at the first to arise rather from the donation of the parent or other ancestor, contrary to common custome, then by common Law: otherwise no need had been of an especiall name. In the originall it seems equally concerned all both sonnes and daughters, as parceners, and for want of such, the brothers and sisters. It seemeth to be first the Law of the Goths or Jutes; for it remaineth in use in these parts of the Easterne Countries. But in later times this estate was also tailed, or cut out sometimes to the sonnes and daughters severally; that is, the sonnes or brothers to have two parts, and the daughters or sisters one part; other times to all the sonnes, and for want of such, to all the daughters: and thus these courses of estates passed over Seas to the

Southern

Southern parts of this Island where that people most settled in a double stream; the first from the Athenians that loved the statelineſſe of their families, the other from the Lacedemonians who deſired rather the continuance of their families then their greatneſſe.

Emmius. Grec.

The manner of conveying of eſtates between party and party was either by act of the party executed in his life time, or after his death: ſuch as were executed in the lifetime of the owner, and were ſuch as for the moſt part were in matters of great moment, were eſtates paſſing by deed of conveyance in writing: and for this way the Saxons were beholding to the Latines, who taught them that courſe, both for form and language; and *Alfred* inforced it by a particular law, viz. that all ſuch as hold Lands by deed in writing ſhould hold them according to the intent thereof, and not alien the ſame contrary thereunto, the intent thereof being proved by witneſſes. The nature of the conveyances in theſe ancient times may appear by a deed of the Kings of this Iſland about 400 yeeres before the Conqueſt, whereby he granted foure plough lands in the Iſle of *Tenet* unto an Abbeſſe; wherein inſtead of that which we now call the *habendum*, the words are *contulimus poſſidendum*, &c. & after that followeth the uſes of the deed, *two uſui* &c. and then concludes with a warrantý, in theſe words, *tu verò ſucceſſoresque tui defendant in perpetuum nunquam me haredesque meos contra hanc chartulam aliquando eſſe venturos*: the effect of which laſt claule may appeare by the Law of the ſale of goods, which in thoſe times was that if the ſale of goods warranted did not hold, the loſſe ſhould light upon the ſeller. The deeds were uſually ſubſcribed with the name of him that made the conveyance, or paſſed the eſtate; and if he could not write his name (as it beſell often) then the Deed was under ſigned with his marke: for *Wihred* King of *Kent* uſed the ſigne of the Croſſe in ſubſcribing his grants *pro ignorantia literarum*. They uſed alſo in thoſe daies to ſeale their Deeds; for ſo much the concluſion of King *Ina*'s Charter to the Abby of *Glaſtenbury* importeth, in words to this effect in Engliſh: *I Inar the King doe confirm this grant and liberty, by ſubſcription of my own hand, and under the ſeale of the holy Croſſe.* True it is *Inguſſus* tels

Conveyances
in writing.

Sax. cap. 37.

Habendum.

Uſe.

Warranty.

Ll. Inx. c. 74.

Ll. Sax. c. 24.

Ll. Edw. c. 25.

Signed.

Sealed.

Concil. Brit.

p. 198.

Witnesses.

Acknowledgement.

Livery and Seisin.
Cragius.

Concil. Brit.
319.

Concil. Brit.
191.

Last will.

us that seals to Deeds were of Norman originall; I believe his intent is concerning seals of Wax annexed or affixed unto deeds. Lastly, in those daies also they used to attest their Deeds by subscribing the names of such as were present; who being of greater or meaner ranke, rendered the credit of the Deed accordingly more or lesse valuable: and upon this ground did the acknowledging or proving of Deeds before the King, Bishop, County, or Hundred, first arise.

That was the Roman fashion; but the more ancient German way of conveyance was by livery and seisin, as most suitable to their ignorance, who had learning in as slight account as the Lacedemonians had, and cared for no more then would serve the turn of naturall necessity. A property they had both in Lands and goods; and where that resteth, no man can deny them the naturall way of giving and receiving by delivery. And therefore though matters of ordinary use seldome come into the observation of story, and this petty ceremony might very well passe *sub silentio*; yet we are not altogether left destitute of the footsteps thereof in antiquity. For *Ætbbald* the Mercian King above eight hundred yeeres agoe gave the Monastery of *Cutham*, with all the Lands thereto appertaining to Christchurch in *Canterbury*, and for the confirmation thereof commanded a clod of earth with all the Writings to be laid upon the Altar. Another Monument hereof more ancient by the space of above 100 yeeres we finde in that grant of *Witbered* King of *Kent*, of foure plough lands in the Isle of *Tenet*, the latter part whereof this clause concludes thus: *Ad cuius cumulum affirmationis cespitem bujus supradictæ terra super sanctum altare posui.*

But every man had not liberty to execute the law of his inheritance in his life time; for some were surpris'd with sudden occasions, and unexpected issues and ends; and in such cases they did what they could to declare their intents by last will, which by common intendment being in writing hath occasioned some to thinke that the Saxons in their originall had no use thereof, being as they conceived so illiterate as not having the use of writing; but the Character remaining to this day evinceth the contrary; nor can those words of *Tacitus*,

& *nullum est testamentum* in any rationall way be expounded in this sence if we consider the context, which runneth thus: *Heredes & successores cuique liberi, & nullum est testamentum.* Which in my opinion founds in this sence: The heires and successors to every one are his children, and there is no testamentary power to disherit or alter the course of descent, which by custome or law is settled. Otherwise to deny them the use of all testamentary power, was a matter quite abhorring the custome of all the Grecians, from whom they learned all that they had. Neverthelesse the Saxons had not been long acquainted with the Romanists, but they had gotten that trick of theirs also of disheriting by last will, as by the testament of *Æthelwulf* and others of the like nature, in Histories may appeare.

The conveyances formerly mentioned concerned Lands and goods; but if no such disposall of goods were, the ancient German custome carried them after the death of the ancestor promiscuously, or rather in common to all the children; but in succeeding times the one halfe by the law of *Edmond* passed to the relict of the party deceased, by force of contract rather then course of descent. After him *Edward* the Confessor re-collecting the Laws declared that in case any one died intestate the children should equally divide the goods, which I take to be understood with a *salvo* of the wifes dower or portion. As yet therefore the ordinaries had nothing to doe with administration; for goods passed by descent as well as Lands; and upon this custome the Writ *de rationabili parte bonorum* was grounded at the common law, as well for the children as the wifes part, according as by the body of the Writ may appeare.

M. Westm.
An. 857.
Malmsb. gest.
Reg. 1. 2. c. 2.

Goods.

F. N. Br. 122.

CHAP. XLII:

Of times of Law and vacancy.

Such like as hath been shewed was the course of government in those darker times; nor did the fundamentals alter either by the diversity and mixture of people of severall Nations in the first entrance, nor from the Danes or Normans in their survenue; not onely because in their originall they all breathed one ayre of the laws and government of Greece, but also they were no other then common dictates of nature refined by wile men, which challenge a kind of awe in the sence of the most barbarous. I had almost forgot one circumstance, which tended much to the honour of all the rest, that is their speedy execution of justice; for they admitted no delaies till upon experience they found that by staying a little longer they had done the sooner: and this brought forth particular times of exemption, as that of infancy and child-bearing, in case of answer to criminall accusations. But more especially in case of regard of holiness of the time: as that of the Lords daies, Saints daies, Fasts, Ember daies; for even those daies were had in much honour. Nor onely daies, but seasons: as from Advent to the Octaves of Epiphany; from Septuagesima till fifteen daies after Easter, or (as by the Laws of the Confessor) till eight daies after Easter; and from Ascension to the eighth day after Pentecost; and though as Kings and times did change, so these seasons might be diversly cut out; as the Laws of *Alfred*, *Æthelstan*, *Ætheldred*, *Edgar*, *Canutus*, and *Edward*, doe manifest; yet all agreed in the season of the yeere, and that some were more fit for holy observation then others. And thus by the devotion of Princes, and power of the Clergy, the foure Terms of the yeere were cut out for course of law in the Kings Court, the rest of the yeere being left vacant for the exercise and maintenance of Husbandry, and particular callings and imployments, saving that even in those times the Courts of the County and Hundred held their ancient and constant course.

Miror cap. 4.
Sec. 19.

Ll. Sax. cap. 10.
Concil. Brit.
518.

course, Last of all, and as a binding law unto all, it was provided that false Judges should give satisfaction to the party wronged by them, and (as the case required) to forfeit the residue to the King; to be disabled for ever for place of judicature, and their lives left to the Kings mercy.

Mirror cap.4.
Sec.18.

CHAP. XLIII.

An Epilogue to the Saxon government.

And thus farre of the joynts of Saxon government in their persons, precincts, courts, causes, and laws, wherein as the distance will permit, and according to my capacity I have endeavoured to refresh the Image of the Saxon Common-weale; the more curious lineaments being now disfigured by time; as farre off it seems a Monarchy, but in approach discovers more of a Democracy; and if the temper of a body may appeare by the prevailing humour towards age, that government did still appeare more prevalent in all assaults both of time and change. The first great change it felt was from the Danes that stormed them, and shewed therein much of the wrath both of God and man. And yet it trenched not upon the fundamentall law of the peoples liberty. The worst effect it had was upon the Church in the decay of the power of Religion and worship of God. For after much toile and losse both of sweat and blood, the Danes (finding that little was to be gotten by blows but blows: and that the Clergy at the least was the side-wind in the course of all affaires) laid aside their Paganisme, and joyned with the Clergy; and as their converts and pupils gained not onely their quiet residence, but the favour of the Clergy to make triall of the Throne, and therein served the Clergy so well as they brought the people to a perfect Idolatry, with times, places, and persons, and subjection of their estates to Church tributes. And as at Tennis the Dane and Bishop served each other

other with the fond Countrey man, that whether Lord Dane or Lord Bishop was the greater burden, is hard to be determined. Thus became ambitious Prelacy in its full glory, and the poore Church of Christ clouded in darknesse, and little hold left for recovery, but onely by the liberty of the Saxon freeman; which the Danes could never conquer, not for want of will or power, but of time and occasion; for the Crown returned to the Saxon line againe after the halfe age of one man, although it was worn by three; so God would have it; nor did any monument of the Danish government remain, saving a few customes in some places which shew rather that the Danes were there then ruled here.

Tacitus.

To summe up all. The Saxon Commonweale was a building of greatest strength downward even to the foundation, arched together both for peace and warre, That by the law of Decenners, wherein Justice was the bond, this by their armies gathered, not by promiscuous flocking of people, but by orderly concurrence of families, kindreds, and Decenners, all choosing their own leaders; and so honour, love, and trust conspired together to leave no mans life in danger, nor death unrevengeed.

It was a beautifull composure, mutually dependant in every part from the Crown to the cloune, the Magistrates being all choice men, and the King the choicest of chosen; election being the birth of esteem, and that of merit; this bred love and mutuall trust, which made them as corner-stones, pointed forward to breake the wave of danger; nor was other reward expected by the great men, but honour and admiration, which commonly brought a return of acts of renown.

Lastly, it was a regular frame, in every part squared and made even by Lawes, which in the people ruled as *lex loquens*, and in the Magistrate as *lex intelligens*; all of them being grounded on the wisdom of the Greekes and Judicials of *Moses*. Thus the Saxons became somewhat like the Jewes, divers from all other people; their lawes honourable for the King, easie for the subject; and their government above all other likeliest unto that of Christs Kingdome, whose yoke is easie, and burthen light: but their motion proved so irregular

irregular as God was pleased to reduce them by another way.

CHAP. XLIV.

Of the Norman entrance.

Thus was *England* become a goodly Farme; The Britons were the owners, the Saxons the occupants, having no better title then a possession upon a forcible entry, with a *continuando* for the space of foure hundred yeares, seldome quiet, either from the claime and disturbances of the restless Britons, or invading Danes, who not onely got footing in the Country, but settled in the Throne; and after gave over the same to the use (as it proved) of another people sprung from the wilde flock of *Normay*, and thence transplanted into a milder Climate, yet scarcely civillized; that in one Isle the glory of Gods bounty might shine forth to all the barbarisme of Europe in making a beautifull Church out of the refuse of Nations. These were the Normans out of the continent of *France*, that in their first view appeared like the pillar of the cloud with terrors of revenge upon the Danish pride, the Saxon cruelty, and Idolatry of both peoples; but after some distance shewed like the pillar of fire, clearing Gods providence for the good of this Island, to be enjoyed by the succeeding generations. Nor was this done by revelation or vision, but by over-ruling the aspiring mind of Duke *William of Normandy* to be a scourge unto *Harold* for his usurpation, and unto the people for their causelesse deserting the royall stemme: yet because the haughtiest spirit is still under fame and opinion, and cannot rest without pretence or colour of right and justice, the Duke first armed himselfe with titles, which were too many to make one good claime; and served rather to busie mens minds with musing, whiles he catcheth the prey, then settle their judgments in approving of his way. First, he was cousin german to the Confessor, and he childlesse: and thus the Duke was nigh, though there were nigher then he; but the worst point

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in the case was that the Duke was a bastard, and so by the Saxon law without the line; nor was there other salve thereto but the Norman custome, that made no difference; so as the Duke had a colour to frame a title, though *England* had no Law to allow it; and this was the best flower of his Garland when he meant to solace himselfe with the English, as may appeare by what his sonne *Henry* the first sets forth to the world in his charter whereby he advanced the Abby of *Ely* into the degree of a Bishoprick, and wherein amongst his other titles he calls himselfe sonne of *William* the great, *Qui Edwardo Regi successit in regnum jure hereditario.*

Spicileg.

M. Paris. 1.
Ant. Brit.
Eccles. 96.

But if that came short, he had the bequest of the Confessor who had designed the Duke to be his successor; and this was confirmed by the consent of the Nobility, and principally of *Harold* himselfe, and in assurance thereof promised his title to the Duke in marriage. This countenanced a double title, one by legacy, the other by election, and might be sufficient if not to make the Dukes title just; yet *Harold's* the more unjust, and to ground that quarrell that in the conclusion left the Dukes way open to the Crown: And for the better varnish the Duke would not be his own judge, he referres his Title to be discussed at the Court of *Rome*; and so flattered the Pope with a judicatory power amongst Princes (a trick of the new stamp) whereby he obtained sentence in his own behalfe from the infallible chaire: The Pope glad hereof laid up this amongst his treasures as an estoppel to Kings for times to come; And the King made no lesse benefit of estoppel against the English Clergy that otherwise might have opposed him, and of assurance of those to him that were his friends, and of advantage against *Harold* that had gotten the Crown from *Ecclesiastica auctoritate* and by that meanes had made Pope *Alexander* and all the Prelates of *England* his enemies.

M. Paris: 2.

Hist. vit.
Eadm. 5.

But if all failed, yet the Duke had now a just cause of quarrell against *Harold* for breach of oath and covenant, where in if *Harold* chanced to be vanquished, and the Crown offered it selfe faire; he might without breach of conscience or modesty accept thereof and be accounted happy in the finding, and wise in the receiving, rather then unjustly hardy in the

the forcing thereof. And this might occasion the Duke to challenge *Harold* to single combate, as if he would let all the world know that the quarrell was personall, and not Nationall.

But this maske soon fell off by the death of *Harold*, and the Duke must now explaine himselfe, that it was the value of the English Crown, and not the title that brought him over. For though he might seem as it were in the heat of the chase to be drawn to *London*, where the Crown was, and that he rather sought after his enemies then it; yet as soon as he perceived the Crown in his power, he disputed not the right, although that was *Edgars*, but possessed himselfe of the long desired prey: and yet he did it in a mannerly way, as if he saw in it somewhat more then Gold and precious stones: for though he might have taken it by ravishment, yet he chose the way of wooing by a kind of mutuall agreement. Thus this mighty Conquerour suffered himselfe to be conquered, and stooping under the law of a Saxon King he became a King by leave: wisely foreseeing that a title gotten by election is more certaine then that which is gotten by power.

CHAP. XLV.

That the title of the Norman Kings to the English Crown was by election.

Some there are that build their opinion upon passionate notes of angry writers, and doe conclude that the Dukes way and title was wholly by conquest, and thence inferre strange aphorismes of state destructive to the government of this Kingdome. Let the Reader please to peruse the ensuing particulars, and thence conclude as he shall see cause.

It will easily be granted that the title of conquest was never further then the Kings thoughts, if it ever entered therein; else wherefore did he pretend other titles to the world? But because it may be thought that his wisdom would not suffer him to pretend what he intended, and yet in practice intended

Hoveden.
Eadmer. Hist.
l. i. p. 13.
M. Paris: vit.
Gulielm.
M. lmsb. l. 3.
fo 154.
Wigorn.
An. 1066.
Glossar.
Ll. Gul. Spicil.
190.

not at what he did pretend: it will be the skill of the Reader to consider the manner of the first *William's* Coronation, and his succeeding government. His Coronation unquestionably was the same with that of the Ancient Saxon Kings; for he was crowned in the Abbey of *Westminster* by the Archbishop of *Torke*, because he of *Canterbury* was not Canonically. At his Coronation he made a solemn covenant to observe those Laws which were *bonæ & approbatæ & antiquæ leges Regni*, to defend the Church and Church men, to govern all the people justly, to make and maintain righteous Laws, and to inhibit all spoile and unjust judgements. The people also entered into Covenant with him, That as well within the Land as without they would be faithful to their Lord King *William* and in every place to keepe with all fidelity his Lands and Honours, together with him, and against enemies and strangers to defend. It is the selfsame in substance with the fealty that the Saxons made to their Kings, as will appeare by the paralleling them both together. The Saxons were sworn to defend the Kingdome against strangers and enemies, together with their Lord the King, and to preserve his Lands and Honours together with him with all faithfulness; so as by the Saxon way the allegiance first terminated on the Kingdome and then as in order thereunto upon the King, with his Lands and honours: but the Norman either wholly omitted the first as needlesse to be inserted in a municipall Law, it selfe being Law in nature; or else includeth all within the words Lands and Honours, taking the same in a comprehensive sence for the whole Kindome, and so made up the summe of the Saxon fealty in fewer figures. Which may seeme the more probable of the twaine, because little reason can be rendred why the King should restraîne that defence to his private lands (if he claimed all by conquest) when as all equally concerned him; or why he should exclude the publike, when as both himselfe and all he had was imbarcked therein, and it might subsist without him, but contrarily not he without it, appeareth not to my understanding; nor did the thing enter into the Kings purpose, if the file of his purposes be rightly considered: For speaking concerning Castles, Burroughs, and Cities, which

which are in nature of limmes of the Common-weale he saith that they were built for the defence of the people and Kingdome; was this the service of walls and fortifications, and not much rather of men within those places of strength? Certainly the plain English is, that in time of breach of publique quiet and peace, the subjects were bound to defend the Kingdome, and in order thereto the people of the same, and of the Kings right included in the publique defence; else it were a strange conclusion, that each man in particular, and in their own person alone was bound to defend the Kings right; but being imbodyed, the Kingdome. And yet more clearly its apparent in that the service of the order of Knighthood which was the chiefe strength of the Nation in those daies, was determined upon the service of the King, and defence of the Kingdome; or which is more plain, for the service of the King in or for defence of the Kingdome, as the statute of *Adormaine* expounds the same. But not to force the Kings sence by argument; if the King had purposely omitted that clause of the Kingdomes safety as of inferiour regard to his own personall interest; it was one of his rashest digressions, wherein he soon espied his errour: for in the midst of his strong and conquering army he held himselfe unassured, unlesse he had a better foundation then that which must change with the lives of a few at the utmost. And therefore besides the oath of fealty formerly mentioned he established a law of association, that all free men should be sworn brethren; 1. To defend the Kingdom with their lives and fortunes against all enemies, to the utmost of their power. 2. To keepe the peace and dignities of the Crown. 3. To maintaine right and justice by all means, without deceit and delay. Joyn then these two oathes together, viz. that of fealty, and this of fraternity; and it will easily appeare, that the allegiance of the English to the Norman Kings was no other then what might stand with brotherhood, and tender regard of the publique above all: and differing from the Saxon fealty onely in this that that was in one oath, & this in two. Wherefore whatsoever respects steered in the reare of the Kings course its lesse materiall so long as the vanne was right, albeit that the sequell will prove

Ll. Gul. Spicil.
61.

M. Paris. An.
1100, 1213.

Stat. 7. E. 1.

Ll. Gulielm.
Spicil. 59.

prove not much different from the premises, as will appear in the foot of the whole account.

*William
Rufus.*

Eadmer. hist.
Wigorn.
M. Paris.

M. Paris
An. 1088.

Thus entered the first Norman upon the Saxon Throne : and as he had some colour of right to countenance his course, so had his sonne his fathers last will, and yet he had as little right as he. This was *William Rufus* that was of his fathers way, but of a deeper die ; and therefore might well be called *William Rufus*, or *William* in grain. He was exceeding happy in the feare or favour of the people, for he had nothing else to make room for his rising. True it is he had the good will of his father, but he was dead, and probably the people as little regarded it as he did them. Nor was it ever observed that the English Crown was of so light account, as to passe by devise of *cestui que use* ; and therefore though it was designed to him from his father, yet both right and possession was left to the people to determine and maintaine. The Clergy first led the way, having first taken a recognisance of him for his good behaviour towards them, which he assured as farre as large promises and protestations would serve the turne ; and within one yeere after, standing in need of the favour of the Commons (to maintaine possession against his brother *Robert*) he gave them as good security as the Clergy had ; which he kept in such manner, that it was a wonder that one of so small interest in the Title, but what he had by the peoples leave and favour, should rule in such manner, and yet die a King : The favour of the people being like a meteor that must be continually fed, or it soon goes out and fals : for evident it is that the right of inheritance was his elder brother *Roberts*, who was the braver man, and more experienced souldier ; and upon these principles had obtained the love of the Norman Barons (the flower of his fathers chivalry) & the liking of the Clergy, after they had found by experience the emptinesse of their hope in his brother *William*, and was every way so superiour to his brother in advantages ; as we are left to believe that *William* got the day without any other ground but onely that God would so have it. Its true the English stooke close to him ; but how they were gained or contained, writers speake not, but tell us of his promises, which also they tell us were vaine, and

and never had issue further then would stand with his profit.

Exit William Rufus, and in comes his younger brother *Henry* *Henry first.* the first of that name: A Prince that excelled in wisdom, and by it ruled his courage, which served him so farre as his aimes and ends reached: His title was no better then his fathers or brothers, but rather worse; for he had no colour of last will to propound him to the people, and his elder brother *Robert* was still alive, and by his service of the Church in the warre of *Jerusalem* might merit that respect of the Clergy, as not to permit him to be a looser by so well deserving service, as in those daies that was accounted. Neverthelesse the English looke upon *Henry* as the fitter man for their turne; being now at hand and *Robert* at *Jerusalem*, and being a native born in *England*, civilized into the English garb by education, and of a wiser and fairer demeanure, and more inclining to peaceable government, which both Normans and English much inclined to as being weary of thirty yeeres service in the warres. And therefore its not marvellous if they applied themselves to him in a way of capitulation, and lesse wonderfull if he hearkned thereunto; and yet neither unadvisedly yeilded unto by him, nor traiterously propounded by them, as some in zeale to Monarchy conclude the point. The worst of the whole matter resting in this, that the King bound himselfe to be just, that he might be great; and the people to submit unto justice, that they might be free: like as their ancestors were, and themselves by the Law established ought to be. For that capitulation was in substance settled by the ancient laws of the Saxons mixed with some additions of laws made by the Kings father, with the joynt advice of the grand Councell of the Kingdom; all which both the Norman *Williams* had often confirmed by solemn protestations and promises, however their actions upon sudden surprisall were *male consuetudinis* and *exactiones injuste*, by this Kings own acknowledgement. Thus these three Norman Kings made their way to the Throne; the first, by armes, under colour of title: the second, by a kind of title, under colour of armes; and the last by favour: but all entered the same by capitulation, election, and stipulation; and for the generall had

Math. Paris.
1100.
Eadmer.
Speed.

Math. Paris.

had some regard to suit their course in order of retaining the good will of their people, although in a different measure, according to the differency of occasions.

CHAP. XLVI.

That the government of the Normans proceeded upon the Saxon principles, and first of Parliaments.

THe principles which I mean, are these: First, the legislative power and influence thereof upon the whole. Secondly, the members of that government, with their severall motions. Thirdly, the laws & customs or rules of those motions: and first concerning the legislative power. Although it be true that the first *Williams* great and most constant labour was to have and to hold and had but little time or liberty to enjoy, yet that time of rest which had, he did apply it and himselfe in the settling of the Laws by advice of Common-councell; I say, not by advice of his own heart or two or three Norman Lords, or of the Norman Nobility onely, as some men take the confidence to averre, as if they had been eye-witnesses to the actions of those daies: but by the joynt advise of the grand Councell of the Lords and wise men of the Kingdome of *England*. I will not insist upon force of argument to shew that common reason must of necessity sway the King into this course, but shall reserve that to another place; the testimonies of Writers must now serve the turn; and herein the testimony of the Chronicle of *Leichfield* must have the first place, which speaks both of a Councell of Lords, and saith that by their advice he caused to be summoned a meeting of all the Nobles and wise men through all the Counties of *England*, to set downe their laws and customes. This was in the fourth yeere of his reigue, or rather after his entry; and as soon as the Kingdome was brought into any reasonable posture of quiet; and which besides the intention of governing the Kingdome according unto Law doth strongly pretend that the Parliament had the legislative

legislative power and right of cognisance, and judicature in those laws that concerned the Kingdome in generall; and for the particular laws or customes of severall places or precincts, it was referred to a Committee or Jury in every County to set them forth upon oath.

Secondly, that this Councell had power to change laws may likewise appeare in that act made concerning the introduction of the Canon law, which shewes not onely the power of that Councell in Church-matters, but also that the Canon was no further in force then the same would allow; and this was also done by the Common councell, and the Councell of the Archbishops, Bishops, Abbots, and all the Princes of the Kingdome, which connection shews plainly that there was Councell besides that of the Prelates and Princes.

Spicil. 167.
Fox. Mart. l. 4."

Thirdly, in matters of generall charge upon the whole body of the people the King used also the helpe of this grand Councell, as may especially appeare in the charge of armes imposed upon the subjects; its said it was done by the Common councell of the whole Kingdome; as is witnessed even by the Kings own law. It may seem also that the grand Officers of the state were elected by such grand assemblie of the wise men; for we finde that *Lanfrank* was elected to the See of *Canterbury* by the assent of the Lords and Prelates, and of the whole people, that is, by the Parliament of *England*: and as probable it is that Bishops were therein also elected, for that the Bishop of *Liechfield* resigned his Bishoprick in such like assembly, if the meaning of *Lanfrank* be rightly understood, who saith in his letter that it was in *conventu Episcoporum atque Laicorum*.

Ll. Gulielm.
c. 58. Spicil.

Antiq. Brit.
to. 110.

Baron. Anal.
An. 1070.

Lastly, that one Law of this Kings which may be called the first *Magna charta* in the Norman times, by which the King reserved to himselfe from the free men of this Kingdome nothing but their free service, in the conclusion saith that their Lands were thus granted to them in inheritance of the King by the Common councell of the whole Kingdome, and so asserts in one the liberty of the free men, and of the representative body of the Kingdome. These footsteps of the Parliament finde we in the Conquerours time, besides other more generall intimations scattered amongst the Historians, which

Ll. Gulielm.
c. 55.

may induce opinion to its full strength, that this King however Conquerour he was, yet made use of this additionall power of Parllament to perfect his designs, and it may be more often then either of his sonnes that yet had lesse pretence of superlative power to countenance their proceedings.

William Rufus was a man of resolution no whit inferiour, if not surpassing his father, and had wit enough for any thing but to govern his desires, which led him many times wilde, and might occasion conceit that he was almost a mad King, though he were a witty man; & therefore its the lesse marvell if he used not the help of the Common councill more then needs must; where Kings many times are told of that which they are loth to know. Neverthelesse *William* the second could not passe over thirteen yeeres without a parley with his Commons and Clergy; unlesse he meant to adventure a parley between them and his brother *Robert*, who like an Eagle eyed his posture, though he hovered afar of.

But *Henry* the first was more wise, and being trained up even from the Cradle in the English garb, moralized by learning, and now admitted into the Throne, found it the wisest course to apply himselfe to the rule of an English King, viz. to winne and maintaine the good opinion of the people by consorting together with them under one Law, and pledging himselfe thereto by taking unto wife one of the English blood-royall; by this meanes reseiued and reassumed the English in partnership with the Norman in their ancient right of government, and reconciled the minds of the people under a lively hope of enjoying a settled government. Nor were they greatly deceived herein; for his course was lesse planetary then that of either of his predecessors, and yet we finde little said of his parley with his people in a Parliamentary way, although more of his laws then of any of his predecessors. The reason will rest in this, that the writers of those times touch more upon matters of ordinary then politicall observation, and regarded rather the thing then the place or manner how. The Lawes therefore although they are not intituled as made in Parllament, yet in the continuation of the History of *Bede* its noted that the King renewed or confirmed the ancient Laws in

in *Concilio peritorum & proborum virorum regni Anglie*, which Bede hist. l. 3. may give sufficient cause to suppose that he declined not the c. 30. ancient way no more then he did the ancient Law.

CHAP. XLVII.

Of the Franchise of the Church in the Normans time.

THe Canon law that ever since *Austins* coming like Thunder rumbled in the cloud, now breaks forth with confusion to all opposers. It had formerly made many faire proffers of service to this Island, but it was disaccepted as too stately to serve, yet by often curtesies received it was allowed as a friend a farre of. For the vast body of the Roman Empire like a body wasting with age, died upward, and left the Britons to their own Laws before the second beast was grown, which being young was nourished under the Imperiall Law of the first beast, till it grew as strong as its damme, and began to prey for it selfe. The Empire perceiving its gray haire, and the youthfull courage of this upstart, was glad to enter mutuall league with it, the one to maintain the Ecclesiasticall Monarchy of the other, and that the Imperiall Monarchy of the former; and so became the Canon and Imperiall Law to be united, and the professors to be *utrinusque juris*. But this parity continued not long; the young beast looked like a Lamb, but spake like a Lyon; and contrarily the Eagle had cast its feathers and could towre no more; so as by this time the Pope was too good for the Emperour, and the Canon law above the Imperiall; yet allowing it to serve the turne: and so the professors of both Laws became students in the Civill but practisers of the Canon. This composition thus made beyond the Seas, the great worke was how to transport it over into this Isle: for the Emperours could intitule the Pope to no power here, because none he had. *Austin* the Monke undertakes the worke; he offers it to the Britons under the goodly title of Universall Bishop: but they kept themselves out

Ll. Edw. c. 3.

Spicil. 167.
Fox Mart. l. 4.

of Canon-shot. The Saxons allowed the title, but liked not the power; The Monk observed the stop, and left time to work out that which present cunning could not, being content for the present that a league of cohabitation should be made between the two Swords, though the spirituall were for the present underling, not despairing that it would worke out its owne way over the Saxon law, as it had done over the Imperiall. Nor did his conceit altogether faile; for the Saxons by little allowed much, and the Danes more; althiough the main was preserved untill the Normans came upon the stage, who made their way by the Popes leave, and gave him a colour of somewhat more then ever any of their Saxon predecessors had done; and to gaine the more quiet possession of the Crown to themselves, allowed the Pope the honour of their Councell learned to draw the conveyance; which as some thinke was made advantageously for the Pope himsele in point of tenure, but more probably in the covenants. For the Conquerour was scarce settled in his seat, but the Canon law began to speak in the voyce of a Royall law: First, complaining of mis-government, as if the Church were extreemly wronged by having the same way and law of triall with the Commons of *England*, and then propounds foure severall expedients, enough to have undone the whole Common-weale in the very entrance; had not the superstition of those times blinded both Parliament and people, and rendered them willing with that which their successors in future ages often repented of.

No offence against the Bishops Laws shall be handled in the Hundred.

By the Saxon law Church matters had the preheminance both in the Hundred, and in the County; and it was the Bishops duty to joyn with the Sheriff in those Courts, to direct and see to the administration of justice: and yet the Canon had been above three hundred yeeres foregoing in the negative.

No case concerning the Regiment of soules shall be brought before the secular Judge.

The Regiment of soules was a common place sufficient to containe any thing that was in order thereunto: and so every one that hath a soule must be no more responfall unto the

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temporall Judge for any matter concerning it, but unto the Ecclesiasticall power; and this not onely in case of scandall, as against the morall law or rule of faith, but for disobedience done to the Canons, made afar off, concerning any gesture or garbe that may come within the favour of an Ecclesiasticall conceit.

That all delinquents against the Bishops laws shall answer the fact in a place appointed by the Bishop to that end.

So as now the Bishop hath gotten a Court by the Statute law, that had formerly no other Cards to shew but that of the Canon, and a Court of such place as the Bishop shall appoint, however inconvenient for distance or uncertainty it be.

That the triall of such matters shall be according to the law of the Canon, and not according to that of the Hundred.

That is, not by Jury, but by witnesses, in a clandestine way if the Bishop please, or without any accuser, or by more scrutiny, or any other way that may reserve the Lay man to the breast of a prepossessed spirit of the spirituall Judge. And thus the poore Countreyman is exposed to the censure of an unknown law in an unknown tongue, by an unknown way; wherein they had no footing but by an implicate faith: And herein the providence of God (I imagine) was more manifest then the wisdom of man, which was too weake to foresee events at so great a distance; For questionlesse it was a point of excellent wisdom for the people (now under a King of a rugged nature that would not sticke to catch whatsoever he could get) to deposite part of their liberties into the hands of the Clergy; from whom moderation might be expected as from friends and neighbours, and (as partners in one ship) mutuall engagement to withstand the waves of prerogative of Kings that seldome rests till it breaks all banks, and sometimes over-reaches its own guard, and cannot return when it would. And thus it fell out; for many times the Pope and Clergy became protectors of the peoples liberties, and kept them safe from the rage of Kings, untill the time of restitution should come; and became not onely a wall of defence to the one, but a rock of offence to the other. For the Tripple Crown could never solder with the English, nor it with that; the strife was for

Spicil. 164.
Baronus Anal.
An. 1068.

Edmer. hist.
l. i. p. 25.

Edmer. hist.
p. 6. & 14.
Spicil. 163.

Epist. ad
Pascal. pap.

for prerogative, wherein if the Clergy gained, the Crown lost, and no moderation would be allowed. For the conquering King was scarce warm in his Throne when as the Pope demanded fealty of him for the Crown of *England*, and the Kings own good Archbishop and friend *Lanfranke* delivered the message; as also *Anselme* did afterwards to *William Rufus*, which though Kings had courage enough to deny, yet it shewed plainly that the Popes meant no lesse game then Crown-glieke with the King and people, the Archbishops and Bishops holding the Cards for the Pope, while in the interim he oversaw all. The Norman Kings thus braved, payd the Popes in their own Coyne, and refused to acknowledge any Pope but such as are first allowed by their concurrence.

Thus have we the second bravado of the Canon Law; for as yet it was not so fully entered, as it seemed. The words of the act of Parliament its true were generall; yet their sence was left to time to expound, and the course of succeeding affaires neverthelesse passed with a *non obstante*. For whereas in those daies the Clergy claimed both legislative and executory power in Church matters, the Normans would allow of neither, but claimed both as of right belonging to the Imperiall power of this Island, originally and onely. As touching the legislative power, its evident that notwithstanding the Canon that had long before this time voted the Laity from having to doe with Church matters; yet the Norman Kings would never allow to the Metropolitans the power of calling Synods nor such meetings, but by their leave, although it was earnestly contended for. Neither could the Clergy prevaile to exclude the Laity out of their Synods, being assembled, nor from their wonted priviledge of voting therein; albeit that for a long time by Canon it had been contradicted. The differences between the Clergy and the Kings concerning these and other matters grew so hot, that Kings liked not to have any Synods or meetings of publique Councell; and Archbishop *Anselme* complained that *William Rufus* would not allow any to be called for thirteen yeeres together; which by the file of story, compared with that Epistle, made up the kings whole Reigne.

Reigne. And this was questionlesse the cause that we finde so little touch upon Parliamentary assemblies in the Norman times, Kings being too high to be controlied, and Bishops too proud to obey; But necessity of State, like unto fate prevailes against all other intereſts whatſoever; and the wiſdome of Henry the firſt in this prevailed above that of his predeceſſors, as farre as their will was beyond his. For it was bootleſſe for him to hold out againſt the Church that ſtood in need of all ſorts to confirme to him that which common right (as then it was taken) denied him; and therefore (though it coſt him much trouble with *Anſelme*) he recontinued the liberty of publique consultations, and yet maintained his dignity and honour ſeemly well. I ſhall not need to cleare this by particulars, for beſides the publique consultations at his entrance, and twice after that, for ſupply or ayd for his warres, and the marriage of his daughter with the Emperour, its obſerved that the Archbiſhop of *Canterbury* ſummoned a Councell at *Weſtmiſter*, but it was *authoritate Regia*, and that there aſſembled *magna multitudines Clericorum, Laicorum, tam divitum quam mediocrium*; and that upon the third day the debate was *de negotiis ſecularibus nonnullis*: The iſſue of all was, that ſome things were *determinata*, others *dilata*, and other matters *propter nimium aſtuantis turba tumultum ab audientia judicantium proſtigata*. Out of which may be probably concluded,

1. That the Laity as yet were preſent in Councels with the Clergy.
2. That they were all in one place.
3. That they all had votes, and that the major number concluded the matter.
4. That certain perſons uſed to determine of the major number by the hearing, and that the votes were ſtill *clamore non calculis*.
5. That they held an order in debating of affaires, *viz.* on ſome daies Eccleſiaſtical, and on other daies ſecular.
6. That all matters concluded were atteſted by the King, who as tis ſaid, did give his conſent, and by his authority did grant and confirme the ſame.

And upon the whole matter it will be probable that as yet Councels, and thoſe now called Parliaments differed not in kind, although poſſibly there might be difference of names, in regard that ſome might be immediately and mainly occaſioned, and urged by Temporall exigences,

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Conten.
Wigorn.
An. 1127.

and others by Ecclesiasticall; but whether Temporall or Ecclesiasticall the first occasion was, yet in their meetings they handled both as occasion offered it selfe.

Secondly, as the Clergy could not attaine the sole legislative power, so neither had they the sole juridicall power in Ecclesiasticall causes; for not onely in case of error in the Ecclesiasticall courts was an appeale reserved to the Kings court, as formerly in the Saxons time: but even those things which seemed properly of Ecclesiasticall cognisance were possessed by the Kings Court in the first instance, as that of *Peter-pence*, which was a Church-tribute, and might be claimed to be proper the Church cognisance much rather than Tythes; and yet by the Law of this Kingdome in the Conquerours time it is especially provided, that defaults of payment of that duty shall be amended in the Kings Court, and a fine for default was given to the King, albeit that the Bishop was made the Collector, and the Pope the Proprietor. And many other particulars, which were holden to be of Ecclesiasticall cognisance, Kings would draw them within the compasse of maintaining the peace of the Church, which properly belonged to them to defend; and so had the cognisance of them in their own Courts, and fines for invasion of the Church rights. But because this may seem but colourable, and by way of flattery of the Churches right, and not in opposition thereof: In other things it will appeare plainly that Kings were not nice in vindicating their own claim in matters which the Clergy held theirs *quarto modo*, as namely in the case of excommunication, a weapon first fashioned by the Churchmen, and in the exercise whereof themselves were in repute the onely masters; and yet in this were mastered by Kings, whose Laws directed and restrained the swelling of that censure, and made it keepe measure; whose Tenants and Officers or servants must not be meddled with by this censure, but by the Kings leave; nor must they be called to answer but in the Kings Court. That right still remained to them after the spoile made by the Hierarchy upon the rights of all the rest of the free men, and therefore could not of right be called *nova* in the Historians sence; seeing that it was no other then the ancient custome used amongst the

Ll. Gulicm.
c. 20.
Spicil. 180.

Eadmer. hist.
p. 6.
Ll. H. 1. cap. 5.

the Saxons before that the Clergy had either purpose or power to reach at such a height as afterwards by degrees they attained unto. Furthermore, the Hierarchy as they neither could possess the legislative nor juridicall power in Church matters; so neither could they possess themselves: for as yet they were the Kings men, and the more the Kings men, because they now thinke a Bishopricke but a naked commodity, if not robed with a Barony. Neverthelesse, before that ever they knew that honour, what ever the Canon was for their election, yet both their title and power *de facto* was derived to them from the Kings, who also invested them with Staffe and Ring; nor had the Pope as yet (though he had conquered the Hierarchy) possessed himselfe of their colours; but during all the Norman times the Kings maintained that trophic of the right they had from their predecessors, notwithstanding the many assaults from *Rome*, and treacheries of the Cathedrals within the Realm; and albeit sometimes Kings were too weak to hold the shadow, yet the convention of the States did maintaine the substance, *viz.* the right of election without intermission, as the examples of *Lanfrank* unto the See of *Canterbury*, and *Anselme* and *Ralph* his successors, and of *Thomas* into the See of *Torke*, and *Ralph* coadjutor to *Thurstan* Archbishop of the same See, and of *Gilbert* into the See of *London*, besides others, doe sufficiently set forth: whether it was because the convention of states was more stout, or that the Bishops now wedded to temporall Baronies were so unquestionably interessed in the publique affairs of the Commonweale, that it was against common sence to deny the States their vote and cognisance of their election, I cannot determine; yet it is a certaine truth, the more Baron, the lesse Bishop, and more unmeet for the service of *Rome*: politiquely therefore it was done by Kings to hold these men by a Golden hooke, that otherwise had prostituted themselves to a forraine power, and proved absolute desertors of their Countries cause, which now they must maintaine under perill of the losse of their own honour.

In the next place, as they were the Kings men, so their Bishopricks and Diocesses were under the Kings power to order,

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Eadmer. Hist.
l. 2. p. 53.
& l. 3. & l. 4.
Eadmer. hist.
l. 1. & l. 5.
Wigorn.
An. 1128.
Spicil. 142.

Eadm. l. 4.
p. 95 96.

Spicell 165.

Ll. Hen. I. c. 7.

Greg: epist. l. 9.

Eadmer: hist.
l. 4 p. 97.

as by the advise of the Bishops and Baronage should be thought most convenient; either to endow an other Bishop with part thereof and so to make two Diocesses of one, as befell in the case of the Diocese of *Lincolne*, out of which the Diocese of *Ely* budded in the time of *Henry* the first, or to endow a Monastery or other religious foundation with part, and exempt the same from all Episcopall or ordinary jurisdiction, as in the example of the foundation of the Abby of *Battall* in *Sussex*, in the time of *William* the Conquerour may appeare.

Lastly, what ever the first intention of this recited Statute were, it may probably be judged, that it was but a noise to still the Clergy; and that it never had more then a livelesse shape, not onely in regard of the before-mentioned particulars, but especially in regard of that subservient law of *Henry* the first concerning the County court which reciteth it as a custome in his time used, that the Bishop and Earles, with other the chieft men of that County were there present as assistants in directory of judgement. And that in order are handled first matters of the Church; Secondly, Crown pleas; Thirdly and lastly, Common pleas; however therefore the King spake faire, they either acted not at all, or so coolly as the current of the custome was too strong; but most probable it is, that the Kings spake faire till they were settled in their Thrones, and afterwards pleased themselves: for by the generall thred of story it may appeare that the Clergy in those times were more feared then loved, and therefore riden with a streight rein. The Prelacy on the contrary grew unruly, yet too weake for the rugged spirits of the Norman Kings; they are glad to be quiet, and the Pope himselve to drive faire and softly, as judging it expedient *potesstatem Regalem mitius tractandam*, and continued that course and posture till the calmer times of *Henry* the first; wherein they mended their pace, and got that without noyse which they had long striven for, viz. the pre-eminence and presidency in the Synods, though the King himselve be present, and (if the Historian writeth advisedly) the whole ordaining, or legislative power, for so runnes the stile or phrase of the author, *Archiepiscopi & Episcopi statuerunt in presentia Regis*, as if the presence of the King and his Barons

rons and people were but as a great *Amen* at the common prayer (after the old flampe) to set a good colour upon a doubtfull matter to make it goe down the better. How the Kings brooked this draught, I cannot say; but it hath made the kingdome stagger ever since, and it may be feared will hardly recover its perfect wits, so long as the brains of the Clergy and the Laity thus lie divided in severall Cels.

● CHAP. XLVIII.

Of the severall subservient jurisdictions by Provinces, Marches, Counties, Hundreds, Burroughs, Lordships, and Decennaries.

HAd the Normans owned no other title then that of Conquest, doubtlesse their mother wit must needs have taught them the expediency of preserving the particular subservient jurisdictions of the kingdome, intire and unquashed, if they regarded either the benefit of their conquest, or reward of their parteners. and allies; unlesse it should be allowed unto Conquerours, to be more honourable for them to doe what they will, rather then what is meet. But hereof there is no cause of question in this present subject: for nothing is more cleare then that *Wales* enjoyed in the Conquerours time, and for ages after him, its ancient liberties, Tribute excepted; nor did conquest ever come so nigh to their borders as to trench upon the liberties of the Marches. For as it had been a piece of state nonsense to have holden two peoples under conquest, and their Marches in freedome; or to preserve them in good neighbourhood by Marches, which by the law of Conquest were made one: so was it no lesse vaine if all had been once subdued by conquest, to have raised up the liberties of the Marches any more.

And as they had lesse cause to have invaded the bounds and ancient limits and partitions of the Counties, so questionlesse had they so done, they would have taken the old course of

County courts

Edmer. hist.
l. 4. p. 96.

ll. Hen. 1. c. 6.

ll. Gulielm.
cap. 41. & 42.

ll. Gulielm.
cap. 64.

Ibid. c. 64.

ll. Hen. 1. c. 7.

Spicil. 197.

Stigand.

the *Micklemete*, as they did divide the Diocesse of *Lincolne* into two Diocesses by advice of the Bishops, Princes, and other wise and holy men, and turned the Abby of *Ely* into a Bishops See. But it was their wisdom to preserve the ancient Landmarks; and no lesse both wisdom and care to continue their due priviledges and interests to each. Every County had its Court, and every Court its wonted jurisdiction: No complaint must be to the Kings Court if right may be done in the County; no distresse must be taken but by warrant from the County, and that must be after complaint thrice made. The County court must be called as our ancestors have appointed: such as will not come as they ought, shall be first summoned, and in case of default distrained, at the fourth default; the complainant shall be satisfied out of the distresses so taken, and the King also for his fine. These are the expresse Laws of the Conquerours own establishment; the last of which also was confirmed by another expresse Law, saving that he would allow but of two summons and two distresses, before execution. And as it was one principall worke that he undertooke to reduce the Lawes into course, which had been intermitted during the violent times of his father and brother (the first of whom never had liberty for reformation, and the latter never had will) so amongst other Laws he settled those concerning the County court, namely, *That the Bishops, Earles, and chiefe men should be present for direction.* 2. *That it should be holden once each moneth.* 3. *That the Church matters should precede, and then the Crown pleas. And lastly, the Common pleas;* besides some other particulars concerning pleading, and proceedings in the handling of causes. Neither were these causes of a petty regard onely, but of greatest concernment: One example I shall remember the reader of, and not recite *in terminis*, but referre to Mr *Seldens* own pen. The occasion was this: *Odo* the Conquerours halfe brother was by him made Earle of *Kent*, and therewith had the gift of a large Teritory in *Kent*; and taking advantage of the Kings displeasure at the Archbishop of *Canterbury*, possessed himselfe by disseisin of divers Lands and Tenements belonging to that See: *Lanfrank* the succeeding Archbishop being informed hereof, petitioned to the King that justice

justice might be done him *secundum legem terræ*; And the King sends forth his Writ to summon a County court: the debate lasted three daies before the free men of the County of Kent, in the presence of many chiefe men, Bishops and Lords, and others skilfull in the Laws; and the judgement passed for the Archbishop *Lanfrank* upon the votes of the free men. This County court was holden by speciall summons, and not by adjournment, as was allowable by the Saxon Law upon speciall occasions: And this suit was originally begun, and had its finall determination in the County court, and not brought by a Tolt out of the Hundred court, as is supposed by an Honourable reporter; nor by the ancient laws could the suite commence in the Hundred, because the Lands and Tenements did lie in severall hundreds and Counties. The upshot of all is that the County courts in those daies were of so great esteem that two of the greatest Peeres of the Realme, one a Norman, the other an Italian, did cast a title in fifteen manors, two Townships, with many liberties upon the votes of the Freeholders in a County court, and that the sentence was allowed and commended by the King, and submitted to by all.

In the next place we are to come to the Hundred Courts, of which there are by the Normans allowed two sorts; the first whereof was holden twice a yeere: This was formerly called the Torne, and was the Sheriffs Court; hereof little notice is taken, saving that by the Laws of *Henry* the first its worke seems to be much designed to the view of free pledges. But the more ordinary Court, is that which belongs to the Lord of the Hundred, unto whom also belong the fines in cases there concerned. *This Court is to be holden once in each moneth; and no suit to be begun in the Kings Court that regularly ought to begin in the Hundred. No distringas shall issue forth till three demands made in the Hundred. And three distresses shall then issue forth; and if upon the fourth the party appeare not, execution shall be by sale of the distresse, and the complainant shall receive satisfaction.*

But by the latter Laws of the same King there is but two summons allowed, and then two distresses; and in case no appearance be, execution shall be for the complainant, and for the Kings fine.

Lastly,

Hundred court.

Ll. Hen. 1. c. 8.

Ll. Gulielm. cap. 41.

Ll. Hen. 1. c. 7.

Ll. Gulielm. cap. 41.

Ll. Gulielm. cap. 42.

Ll. Hen. 1. c. 54.

Ll.Hen.1 c.7.

Lastly, as the case concerned either persons or places, sometimes they used to joyn severall Hundreds together into one Court: but this was by speciall Commission or Writ.

*Courts of
Towns and
Mannors.*

Ll.Hen.1 c.7.

Decenners.

As touching inferiour Courts of Towns and Mannors, there's little observation to be had, being of too private a regard to come into fame in those rough times; yet in *Henry* the firsts Laws its ordered that Town courts should meet every moneth; and that Lords should hold Plees either in their own persons, or by their Stewards, and that the chiefe man in that Parish, with foure other of the chieffer sort, and the Minister or Parish Priest should joyn their assistance in that worke. But in nothing more did the Norman Kings shew their paternall love to the Common-weale, then in the law of pledges or Decenners: for as of all other beauties it suffered most blémiss from the storme of the Norman invasion; so was it their especiall care to renew the life thereof, not now amongst the natives onely; but joyning the Normans to the Saxons in the same bond of brotherhood, utterly drowned thereby, all memory of Lordly power, and so of divers peoples making one, conquered even conquest it selfe, if any were, and made all joynt partners in one common liberty.

Ll.Gulielm.
cap. 64.

Ll.Hen.1 c.8.

Every free man must be under pledges to satisfie justice in case of delinquency.

Over every nine persons under pledges there must be one man in authority.

View of free pledges must be to see that the Decennaries be full; and if any be departed, to enquire the cause: and if any be come in, whether he be under pledges or not.

And thus the Norman Kings had their people under treble guard: one of fealty, the other of association, and the third that of pledges; and all little enough to secure that which they in their own consciences might have some cause to question, whether it belonged to them or not.

CHAP. XLIX.

of the immunities of the Saxon free men under the Norman government.

THe freedom of an English man consisteth in three particulars: First, in ownership of what he hath. Secondly in voting any Law wherby that ownership is to be maintained: and thirdly, in having an influence upon that Judicatory power that must apply that Law. Now that the English under the Normans enjoyed all this freedom unto each mans own particular, besides what they had in bodies aggregate, may appeare, as followeth: The free men of *England* were such as either joyned in the warre with *Harold* against the Normans; or such as absented themselves from the way of opposition or enmity, and were either waiting upon their own affaires, or siding with the Normans: and questionlesse all the sadnesse of the warre befell the first sort of the English; whose persons and estates (to make the waies of the first Norman *William* regular, and of one piece) never fell so low as to come under the Law (or rather the will) of conquest; but in their worst condition were in truth within the directory of the Law of forfeiture for Treason against their Sovereigne Lord, whose claim was by title, as hath been already noted. The other sort either did appeare to be the Normans friends, or for ought appeared so were; and so never offending the Law never suffered any penalty; but held their persons and possessions still under the patronage of Law, as anciently they and their ancestors had done; and that this was the Normans meaning, they publish the same to the world in a fundamentall Law, whereby is granted, That all the free men of the whole Kingdom shall have and hold their Lands and possessions in hereditary right for ever.

Ll. Gulielm.
cap. 55.

And by this being secured against forfeiture, they are further saved from all wrong by the same law which provideth,

That they shall hold them well or quietly, and in peace free
from

from all unjust Tax, and from all Tallage, so as nothing shall be exacted nor taken, but their free service which by right they are bound to performe.

This is expounded in the Laws of *H. 1.* cap. 4. that no tribute or tax shall be taken, but what was due in the Confessors time.

Under the word Tax is understood *monetarium commune* per ciuitates, or comitatus; so as aides and escuage are not included, for they are not charged upon Counties and Cities, but upon Tenures in Knight-service: nor was Dane grelt hereby taken away, for that was a Tax in the Confessors time, and granted by Parliament.

*Statutum est eis,
& illis à nobili-
tatem & con-
cilio per com-
mune concilium
regis Regni
nostri.*

*Ll. Gulielm.
cap. 42. & 45.*

*Gloss 227.
Camb. Bri.
Norff.*

So then the Norman Kings claimed no other right in the lands and possessions of any of their subjects, then under and by the law or common right; and they conclude the law with a *sicut*, which I thus English, As it is enacted to them, (or agreed by them) and unto them by us given and granted by the Common-councell of our whole Kingdome. I leave the words to be criticized upon as the Reader shall please; being well assured that the most strained sence can reach no further then to make it sound as an estoppel or conclusion to the King and his successors, to make any further claim unto the estates of his subjects then by Law or right is warrantable; under which notion conquest never did nor can come, as shall more fully be manifested hereafter. But the right genius of this law will also more evidently appeare by the practice of those times, which even when justice it selfe did most importune, so tenderly regarded the liberty of mens estates, that no distresse could issue without publique warrant obtained, and upon three complaints first made, and right not done; and when rape and plunder was in the heat, and men might seem to have no more right then they had power to maintain: yet even then this Law was refuge sufficient for such as were oppressed; and was pleaded in barre against all usurpations and intrusions, under pretext of the Conquerours right whatsoever, as by the case of *Edwine* of *Sbarneburne* may appeare. Secondly, that the free men of *England* had vote in the making of Laws, by which *meum* and *tuum* was bounded and maintain-

ned

ned, as may appeare by what hath been already said; nor shall I endeavour further therein. Thirdly, they had an influence upon the judicatory power; for first, the matter in fact was determined by the votes of the free men, as the Lawes of the Conquerour, and of *Henry* the first doe sufficiently manifest. Secondly, they had an influence in the making of the Sheriffe, who as well as the Bishop was by election of the people. Thirdly, they had an influence upon all Judges by setting a penall Law upon them in case of corruption; which if not so penall as to take away life, was neverthelesse penall enough to make an unjust Judge to be a living pattern and example of misery, to teach others to beware.

Ll. Gulielm.
cap. 15.

Two things more must be added, though somewhat collaterall to this purpose. Concerning the right of the free men in the common Mint, and in their villains. Concerning the Mint, that the Saxons having made it as parcell of the demesnes of the kingdome, and leaving to the King onely an overseership, reserved the controll and chiefe survey thereof to the grand Councell of the kingdome, who had stated the same in the Confessors time. But after him the Normans changed the current according to their own liking, till by *Henry* the first it was reduced into the ancient course, allowing no money but such as was currant in the daies of the Confessor, whose laws also (with some alterations by the Conquerour, with common advice) he also established. Concerning the Lords right to their villains it is observable, first, that liberty of infranchisement was allowed, which could never have been, had not the liberty of the subject been saved. Secondly, that Infranchisement properly is the worke of the people, or the body, and the Lord was to deliver his villaine by his right hand unto the Sheriffe in full County court, and pronounce him free from his service, and shall make roome for him by free passage and open doores, and deliver him free armes, viz. a Lance and a Sword, and then he is made a free man, as I conceive, to all intents and purposes. Otherwaies there might be manumission, as if the villaine remained in a City, Burrough, walled Town, or Castle by a space of a yee and a day, and no claime made to his service by his Lord, he shall be thence-

Ll. Æthelst. c. 6
Ll. Ætheldr.
c. 22.

Ll. Hen. i.

Ll. Gulielm.
cap. 65 & 66.

Ll. Gulielm.
c. 66.

Ll. Gulielm.
65.

forth free from the service of his Lord for ever; and yet this manumission could not conclude any but the Lord and his heires or assignes: nor could it inforce the body to allow that for a member which was none before. Thirdly, that notwithstanding they allowed the Lords liberty of infranchisement, yet would they not allow them free liberty of disposing them as other chattels; nor by the law of the Conquerour might they sell their villains out of the Countrey, or beyond Sea, for the King had right to the mediate service of every villaine, though the Lord had the immediate; and therefore that Law might hold in force: neverthelesse the Ordinance that *Anselme* made, that no Lord should sell his villaine, they would never allow for a Law, nor did it hold in force.

CHAP. L.

A recollection of certaine Norman Lawes, concerning the Crown in relation to those of the Saxons formerly mentioned.

First and second Com-
mandements.
1.

I Call them Norman Lawes because they were allowed by them or continued in force, although many of them had their originall from the Saxons.

One God must be worshipped; and one faith of Christ maintained thoroughout the whole Kingdome.

Ll. Gulielm.
c. 51.

Ll. Hen. 1. c. 75

This is found amongst the Laws of King *William* published by Mr *Selden*, and was for substance in the Saxons time, saving that we finde it not annexed to the Crown summarily untill now; so as by this law *Heresie* and *Idolatry* became Crown pleas; and the like may be collected concerning blasphemy, concerning which its said, as of the servants killing his Lord, that its impardonable: nor could any man offend herein, but it endangered his whole estate. The triall of these crimes is not found particularly set forth. It might possibly be in the meeting

meeting of the Clergy, and as possibly in the County court of the Torne where the Bishop was present *Jura Divina edocere.*

Peterpence, Ciricksceate, and Tithes, must be duly payd.

2.

These are all Saxon laws united to the cognifance of the Crown, as formerly hath been shewed: Onely the first *William* especially provided, that in case any man worth thirty pence in chattels did pay foure pence for his part; it should be sufficient both for himselfe and his retinue, whether servants or retainers: and defaults in payment of these duties were finable to the King.

Ll.Gul. c.18.

& c.20.

Ll.Hen.1.c.10.

Invasion upon the right of Sanctuary fined.

3.

Ll.Gulielm.

cap.1.

This I note, not so much in relation to any such law amongst the Saxons, as to the future custome, which now began to alter, according to the increase or wane of the Moone. I doe not finde this misdemeanour to be formerly so much taken to heart by the Crown; nor possibly would it have been at this time, but that the King must protect the Church, if he meane to be protected by it: and it was taken kindly by the Churchmen, till they found they were able enough to defend their owne right by themselves. Amongst all the rest of Church rights this one especially is confirmed, viz. That any delinquent shall have liberty of Sanctuary to enjoy both life and member, notwithstanding any law to the contrary. This priviledge was claimed by the Canons; but it must be granted by the Temporall power, or else it could not be had; and though it be true that Kings formerly did by their Charters of foundation grant such priviledges in particular; yet could not such grants create such immunities contrary unto, or notwithstanding any publique law of the kingdom; and therefore the Monasteries had their foundations confirmed by Parliament, or generall assembly of wise men, if the first foundation was not laid thereon.

Working upon the feast daies punished by fine.

4 *Commandement.*

V 2

Before

Ll.Hen.1.c.10

Before this time no daies for solemne worship of God were acknowledged by the law of the Kingdom, but the Lords daies. By this all daies celebrated or instituted by the Church for that purpose are defended by the civill power, and breach of the holy observation of these daies made inquirable, and punished amongst other pleas of the Crown.

6 *Commandment.*

Breach of the peace, bloodshed, and manslaughter punished by fine.

Ll. Gulielm.
cap. 67.

Ibid.

Miror 254.
Ll. Gulielm.
c. 8, 10, 12,
13, &c.

Ll. Gulielm.
cap. 3.

This was the ancient Law of the Saxons, and was continued without alteration till about *Alfreds* time, whose zeale against blood caused murder to be punished with death; but the Danes bringing in a moderation, if it may rightly be so called, are now seconded by their kindred the Normans, who will not admit of punishment by death, partly because being a warlike people, bloodshed might seem to ranke it selfe under the Regiment of valour; and partly because they owed much to that Title for the possession of all that they had gotten in *England*. And to prevent scandall, entring upon the reare, opinion stept in, that a miserable life was more penall then death; and therefore in crimes of the deepest die they would to fine and losse of member: and which course prevailed most, either to stop or enlarge the course of that sinne, was left to the disposition of such as intended to make triall. But in matters of lesse malignancy the purse rather smarted then the body, wherein they proceeded so farre as to punishment of death by violence; yet was not the fine to be measured by the judgement of the mercy or rigour of any person, but onely of the Law it selfe, which set down in certainty both the nature and quantity of the fine; and left that memoriall upon record of a good mind at least to an equitable and just government. In all these cases of breach of peace the Kings Court becomes possessed of the right of cognifance, and the peace is now called the Kings peace; not so much because that it is left onely to his providentiall care to maintaine as because the fines, for most of those crimes pertained to the King: for otherwise there is a sort of crimes that are *contra pacem vicecomitis*, as will be more cleared hereafter.

I shall conclude this subject with these three observations : First, that the Laws in those ancient times of the Normans were so generall, as they then made no difference between places or persons; but whether the peace was broken upon holy or common ground, or upon a Lay-man, or one in orders, the Lay power seised upon all. The second is the care they had for apprehending of the offenders in this kind. If the party slaine were a Norman or Frenchman, the Lord of the manlaier was charged to have him forthcomming within a certaine time, or to pay the Kings fine of 46 Marks so long as he had wherewith to satisfe, and what remained the whole Hundred was charged. But if the party slain were of any other people, the Hundred was immediately charged with the man-llayer, and must bring him to answer within a certaine time, or pay the Kings fine. The third and last is, the care they had to prevent breach of peace for the future : First in setting of nightwatches by all Cities, Burroughs, Castles, and Hundreds, in such manner as the Sheriffe or chiefe Officers by common councill shall advise for the best safety of the Kingdome. Secondly, in forbidding intertainment of unknown persons above three daies without surety for his good abearance, or becomming his pledge for the publique safety, nor to let any person passe away without testimony, under the ministers and neighbours hand of their good carriage.

Ll.Hen.1.c.10.

Ll.Gulielm.
cap.53.

Ll.Gulielm.
cap.26.

Ll. Gulielm.
c.56.

Ll.Gulielm.
cap.46.

Ll.H.1.c.8.

A man committing adultery with a married woman shall forfeit to his Lord the price of his life.

7. *Commandement.*

This made the crime inquirable at the common law as an offence *contra pacem Domini*; but afterward it was finable to the King, and inquirable amongst the pleas of the Crown by the law of Henry the first.

1.
Ll: Gulielm.
cap.14.

Ll.Hen.1.c.10.

Force upon a woman, to the intent to ravish her, is fineable; but if a Rape be committed, it shall be punished with losse of member.

2.
Ll.Gul. c.19.

The Crimes and offences against this Commandement were alwaies punished in the Temporall Courts; by fine at the least; and are still in the Normans time prosecuted in the same way

not-

notwithstanding the growing authority of the Canon.

8. *Commandement.*

Robbery is finable.

Ll. Gulielm.

cap. 4.

Glanv. l. 6. c. 6.

Hoveden.

9 *Commandement.*

Ll. Gulielm.

c. 57.

Ll. Hen. I. c. 10.

The different Law between the Saxons, Angles and Danes, now by the Normans is settled in the more mercifull way; and in case the delinquent made flight, the pledge satisfied the law for him. But in the latter times of *Henry* the first the law was again reduced to the punishment of this crime by death, and so hath continued.

There shall be true weights and measures throughout the Kingdome, and those shal be sealed.

And this was the constant Saxon Law.

Perjury to be punished by fine, and as formerly still inquirable amongst the Crown pleas.

CHAP. LI.

The like of Lawes that concerne common interest of Goods.

Ll. Gulielm.
cap. 6.

1.

IF Cattell be taken by distresse the party that will replevy them shall pay for the returne of the Cattell, and give security to bring the distresse into the Court, if within a yeere and a day it be demanded.

This Law I take to be intended where the Cattell are taken dammage *faisant*; because nothing shall release the distresse in other cases, but obedience to the summons.

2.

Ll. Gulielm.
c. 42.

No distresse *ad comparendum* shall be taken but after three severall summons, and so many defaults made; and in such case distresse shall issue by especiall order from the County court.

I noted this partly to shew the difference of the Normans from the Saxons in the delay of execution of justice by so much mean proceffe, and partly to shew the difference between the Norman

Norman times, and these daies wherein mens Cattell lie open to the distresse of every oppressing or extorting Bailiffe or unknown person, and no summons made at all, whereby many poore mens estates are either undone, or they must submit to the unjust demands of their adversary.

No manner of goods of above foure pence in valew shall be bought unlesse in the presence of foure witnesses of the Town. And the vendor shall satisfie out of his own estate, if the sale be not effectually, and in case the vendor have no warrant for such goods by him sold.

3.
Ll. Gulielm.
cap. 43.

No living Cattell shall be sold, but onely in Cities, and before three witnesses; nor shall any thing forbidden be sold without warranty.

Ll. Gulielm.
cap. 60.

No faires or markets shall be holden, but onely in Cities, Burroughs, walled Towns and Castles.

Ibid. c. 61.
5.

These Lawes concerning sales and markets were ancient Saxon lawes, and tend all to the avoyding of cheating men of their Cattell by surreptitious sale of them made by such as had no right.

Goods found shall be published by the finder to the neighbourhood; and if any makes claime and prooffe of them to be his, he shall have them, giving security to bring them into the Court, in case any other shall within a yeere and a day make his claim thereto.

6.
Ll. Gulielm.
cap. 7.

The children of persons intestate shall equally divide the heritage.

Ll. Gulielm.
cap. 36.

This is *in terminis* the Saxon law, and therefore concerning it I shall referre to the same formerly recited; onely I shall adde hereto the law of Henry the first, which may serve as an explanation of the former. Any free man may devise his chattels by will: and if he die intestate, his wife, children, parents, or next kinne shall divide the same for his soules good. The first branch whereof was ancient, and doubtlesse in continuall use;

Ll. Henr. 1.

but

but the iniquity of the Norman rude times was such, that the Lords under surmise of arrears or reliefe would seise all the personall estate after the tenants death, and so the right of last wils was swallowed up; but this restoreth the power of last wils into its place, and in case the party died intestate, preferreth a kind of nature of descent, although they be more personall. Nor doth that last clause of the foules good disannull the same, although the words may seem to carry away the benefit to some other hand. For the whole matter is left to the discretion of such as are next to the intestate.

CHAP. LII.

Of Laws that concerne common interest of Lands.

THe Laws that concerne Lands, and peculiarly belonging to the Normans, are such as concerne principally the tenure of Lands; which if duly considered, although favoured somewhat of the King, yet little of the Conquerour: for generally it must be granted that tenures long before and after this time, were as the services, ordered according to the will of the giver, in which as the King had the greatest share, and he the most publique person of all: so were his donations ordered chiefly to advance the publique service; and in this regard the tenure by Knight service might more principally challenge the Kings regard then the regard of all the great men besides. But this was not the soare, yea rather it was the beauty and strength of the Kingdome; and for which the King deserved an honorable name above most of his progenitors, who had not so much land to dispose of as he had, and therefore could not advance that service in any proportion equall unto him. The sore that caused so many sighes, was the incumbrances raised upon this most Noble and free service, which through the evill of times by this meanes became the most burthensome and the onely loathed and abhorred service of all the rest. I say through the evill of times; for it cannot lodge in my thoughts but in
the

the Norman times the incumbrances were nothing so great as of latter ages, and that much hath been imputed to the Lawes of the Conquerour, which they never deserved, as may appeare in these particulars, which the Laws of *Henry* the first have preserved in memory.

Tenant of the King or other Lord dying, his heire shall pay no other reliefe then what by Law is due. 1 Reliefe.
M. Paris
An. 1100,
& 1213,

That which by Law is due is set down in the laws of *William* the Conquerour.

| | | | |
|-------------------------|----------------------|--------------------------------|--------------------------|
| The Reliefe of an Earle | { | 8. Horses saddled and bridled. | Ll. Gulielm. cap. 12. |
| | | 4. Helmets. | |
| | | 4. Cotes of Maile. | |
| | | 4. Shields. | |
| | | 4. Speares. | |
| | | 4. Swords. | |
| | | 4. Chafers } | |
| 1. Palfray } | bridled and saddled. | | |

| | | | |
|------------------------|----------------------|-----------------------------------|--------------|
| The Reliefe of a Baron | { | 4. Horses with Saddles & Bridles. | Ibid. c. 23. |
| | | 2. Helmets. | |
| | | 2. Cotes of Maile. | |
| | | 2. Shields. | |
| | | 2. Speares. | |
| | | 2. Swords. | |
| | | 2. Chafers } | |
| 1. Palfray } | bridled and saddled. | | |

| | | | |
|---|---|------------------------|---|
| The Reliefe of a Vavasor to his Lord | { | His best Horse. | } Ibid. c. 14. |
| | | His Helmet. | |
| | | His Cote of Maile. | |
| | | His Shield. | |
| | | His Speare.. | |
| | | His Sword. | |
| | | Or if he had no Armes, | |
| then he was to pay | s. 100 | | |

The reliefe of the Countrey man is the best beast that is in his possession; and of him that farmeth his Lands a yeeres rent. Ll. Gulielm.
cap. 29.

These are the Relieves due by law, and now settled in goods or armes, but afterwards turned into money; and its likely that the ill customes in the former times did extort both money and armes, or such summes of money as they pleased; and by the very words of the law it seemes they had brought it to an arbitrary power to take what they could get, and yet all against Law.

2.
Marriage.

The Kings tenant shall advise with the King in marriage of his daughter, sister, neece, or kinswoman; and his widdow in like manner.

The sence hereof in short is, that these might marry at their own will, without paying fine or composition to the Lord, and yet must have the liking of the Lord so farre as to declare whether the man intended were his enemy or not, and fit to performe Knight service. This law was therefore grounded upon the present distresse of affaires, wherein the nation was unsettled, and common right having established a mutuall trust between Lord and Tenant found out this meanes to preserve the same; for if the marriages of those that are related to the Tenant in such manner as may inherit part or all his lands, or have joynture therein, should be left altogether at the liberty of the Tenant or his widow; it must needs follow that the mutuall trust between Lord and Tenant must faile, and the publique receive damage. And therefore if this custome were of Norman birth, it was begotten upon a Saxon law, and might the rather be owned by the English.

3.
Dower.

The widdow of the Kings Tenant having children, shall have her dower and portion so long as she keeps unmarried.

The portion here is in the Latine word *maritagium*, which I take to be the marriage portion given by the husband according to the Saxon custome, when as the dower in land was not in use, whereof is spoken formerly in that Chapter of dower. And the Normans were necessitated to introduce this custome of theirs with themselves, partly because it was a priviledge which was their own by birth, and it could not be waved without an evident wrong done to the wives of these men

men who had ventured their lives in that service; but principally because it would not consist with the worke in hand to disclaime that custome which must needs be of infinite consequence in the effecting of what was principally sought after, *viz.* the union of the two peoples Normans and Saxons into one: I say it was principally sought after by the Norman conquerour, if not led thereto by his own genius, yet necessitated thereto by force of reason of state, as shall appeare hereafter. And what could be imagined a more ready way to stay the effusion of blood, and all other unhappy events of enmity, then by taking away enmity it selfe? or a more speedy and certaine course for union, then to reduce the men and women of each people to mutuall society, and to seale up all by a lasting bond of marriage? or greater encouragement for the comfortable proceedings therein, then the setting of the constant maintenance of the wife, in case of survivorship by the law of dower of the Lands and Tenements of the Husband? which was so full of contingencies, and uncertainties in the portion of goods that was by the Saxon law appointed to the wife in such case. Nor was this all; for by marriage thus made to the Normans they had a great hold, not so much over the English, as in the English, and that not onely during coverture, but by reason of this title of Dower the women became tenants, and under the Lords wing, so as they durst not willingly and illegally offend their Lord in their widdowhood, nor by law nor reason match themselves and their dowry to any other that was not first allowed by the Lord to be in friendship with him; and thus became the tenants widdows to be at the liking of the Lord for their marriage: and the like hereto may be said concerning the husband in case of tenant by the curtesie; and however by the Norman former practise it was much disturbed; yet by Henry the first it was again reduced to its former right, rather then originall arising from his grant, as some hold, and proved advantageous for the ends aforesaid. Now as touching their marriage portion of goods, because the Saxon law had already endowed them thereof, they could not be induced to lay down their known ancient right, till they found the new law of dower to settle, and so for some

Lindenbrog.
Concil. Æn-
ham. c. 19.
Ll. Edm.

Miror fo. 20.

time both laws were in force, untill the more ancient Saxon law had an honourable buriall. Nevertheless for the present the law abridged that right so farre as to limit it to the widdow during widdowhood, according to the former Saxon law. Upon consideration of all which it may well be conceived that the power of the Lords in consenting or dissenting to the marriages of their tenants, widdows, and wards, was not so much an usurpation upon the common right of the English subjects, as a custome rationally, and with great wisdom, as the course of affaires then stood, upholden and allowed amongst them, principally for the speedy settling of a peaceable government, and consolidating of two Nations into one, and wherein *England* was then so happy as to come to a conclusion in seven yeeres, which cost their ancestors nigh two hundred yeeres experience with the Britons, besides a world of bloodshed that might have been spared, ere they could finde out the right way to a desired peace by mutuall marriages had between them.

cap. 4.

4.
Wardship.

Such widdow shall have the custody of the Lands of such children, or otherwise such other person as by right ought to have the same.

M. Paris.

This is the first news of Wardships, that passed abroad *cum privilegio* of a received Law, which together with the former declare the right custome of the Normans, and thereby the *injustas consuetudines quibus Anglia regnum opprimebatur*, viz. Arbitrary reliefe taken of the Tenants estate, arbitrary marriages made of their persons, and arbitrary grants of guardianship of their lands; for as yet oppression was not so high flown as to cast the government of the persons of their Wards out of the view of the Lords provisionary care, upon adventure of the next inlaw, whether man or woman, wife or unwife, under pretence to train him up in military service fit for the Lords own safety, and the Kingdomes lifeguard: but it was the proper ground of the Lords own seisure and right of wardship, he being looked upon by the eye of common reason as the onely meet man that both could and would effect that worke, so as might be most advantageous to the publique, which seemed to be chiefly

con.

concerned herein; and upon the same generall ground the survey of fooles accompanied the former, albeit it was not in practise till Henry the first brought it in, as the *Mirror of justice* faith (fo. 258.) yet it came upon an ancient foundation laid in the time of the Danes. For my own part I will not dispute the point whether this custome of Wardship was purely Norman, or whether it was derived from the Saxons anciently, who possibly might have some respect to Orphans, in such cases to traine them up for the publique service in point of war, especially being possessors of a known right of reliefe, as well as *Alfred* the Saxon King did undertake the worke for the training of some such particular persons in learning for the service of the publique, in time of peace and civill government; yet thus much appeareth that guardianship of Lands was a known custome enough to make and maintaine a right, and that it by law was a right belonging to some persons before others, and that this had been a custome before the former unjust customs crept into government of the Conquerour, and principally of his sonne *Rufus*: and though it be questionable whether it settled first upon the Normans or the English, yet its manifest that if one people had it, the other people now comming into union with that people, could not in reason except against that custome which the other people had taken up upon so honorable grounds as reason of State, which as the times then were, was evident and superlative; especially the customes being under the regulating of Law, and not of any arbitrary power, and can be no pretexts of the reliefe, marriage and wardship that after ages usurped.

Ll. Canut. 37.

Aſſe: Menev.

Tenants in Knights service shall hold their Lands, &c. acquitted of all taxes, that they may be more able to provide Armes, and be more ready and fit for the Kings service, and defence of the Kingdome: cap. 5. *Acquittall.*

This law whither it be a renewing of a former custome, or an introduction of a new Law, its cleare it was upon an old ground: That Tenants by Knight service must be ready for the service of their Lord, and defence of the kingdome, whereof afterwards: But the law is, that these men shall hold their

their lands of that tenure acquitted of all taxes, though legally imposed upon the body of the Kingdome, which must be conceived to be for the publique benefit, *viz.* either for the preparation or maintenance of publique warre; for in such cases it hath been in all times held unreasonable that those whose persons are employed to serve in the warres should hold lands doubly charged to the same service, *viz.* to the defraying of their own private expences in the warre, and maintenance of the publique charge of the same war besides.

CHAP. LIII.

Of divers Lawes made concerning the execution of justice.

Although in proceedings in cases of vindicative justice delinquents might seem to be left rather to the fury than mercy of the law; yet so long as men are under the law, and not without the law, it hath been alwaies held a part of justice to extend what moderation might possibly stand with the honour of the law, and that otherwise an over rigid and fierce prosecution of the guilty is no lesse tyranny then the persecution of the not guilty; and although violence was the proper vice of these times, yet this point of honour must be given to the Normans, that their Sword had eyes and moved not altogether by rage, but by reason.

1. No sentence shall passe but upon averment of the complaint
11. Hen. 1. c. 5. by accuser or witnesses produced.

2. Fine and pledges shall be according to the quantity of the
11. Hen. 1. offence.
M. Paris.

By these two laws of *Henry* the first the subjects were delivered from three great oppressions: first, in making them offenders without complaint or witnesse. Secondly, in imposing inmoderate fines. Lastly, in urging extraordinary baile.

For

Forfeiture of fellons Lands is reduced to a yeere and a day. 3. Miror fo. 261.

The Normans had reduced the Saxon law in this case unto their own last, which stretched their desire as farre as the estate would beare; but this being so prejudiciall to the immediate Lords who were no offenders in this case; and so contrary to the Saxon law, it was both done and undone in a short space by the allowance of *Henry* the first.

Intent of criminall offences manifested by act punished by fine or mulct. 4.

This by *Alfreds* law was punished by Talioes law, but now Miror fo. 254. by a law of *Henry* the first reduced to mulcts.

Mainperners are not to be punished as principals, unlesse they be parties or privies to the failing of the principall. 5.

This law of *Henry* the first repealed the former law of *Canutus*, which must be acknowledged to be rigorous, although not altogether without reason. Miror fo. 141.

No person shall be imprisoned for committing of mortall crime unlesse first he be attainted by verdict of twelve men. 6. Ll. Hen. 1. c. 5.

By imprisonment is intended close imprisonment, or imprisonment without baile or mainprise; for otherwise its apparent that as well by the Saxon as Norman laws men were brought to triall by restraint.

Appeales of murder restrained within the fourth degree. 7.

Before this law Appeales were brought by any of the blood or kinne of the party slaine; but now by *Henry* the first restrained. The ground seems to be, for that affection that runnes with the blood, grows so cold beyond the fourth degree that the death of the party is of so small account as can it scarcely be reputed a losse of such consequence to the party, as to expose the life or price of the life of the manslayer unto the claime of such an one; and thus the Saxon law that gave the satisfaction in such case to the whole kindred, became limited to the fourth degree, as I conceive from the Ecclesiastical constitution concerning marriage. Two

Mirror cap. 2.
Sec. 7.

Two things more concerning juridicall proceedings may be noted, the one concerning speedy course of justice, wherein they may seem to justifie the Saxon way, but could never attaine to their pace, in regard they yeilded so much time to Summons, Effoines, &c. The other concernes election of Judges by the parties; for this we finde in the lawes of Henry the first.

CHAP. LIV.

Of the Militia during the Normans time.

THe power of Militia is either the legislative or executory power; the legislative power without contradiction rested in the grand Councell of the Kingdome, to whom it belonged to establish laws for the government of the kingdome in time of peace. And this will appeare in the preparation for warre, the levying of warre, and manning thereof after its levied: for the preparation, it consisteth in leavying men and munition, or of money; In all which questionlesse will be a difference between raising of warre by a King to revenge a personall injury done to the Kings own person, and a warre raised by the whole Kingdome, or representative body thereof, which is commonly done in defence of publique interest, and seldome in any offensive way, unlesse in recovery of a right of possession, either formerly lost, or as yet not fully settled. Now although it be true that seldome do injuries reflect upon the Kings person alone, but that the Kingdom will be concerned therein to endeavour a remedy; yet because it may fall out otherwise, Kings having been occasioned to leavy war of their own accord, but in such case could neither compell the persons of his subjects or their estates to be contributory. And of this nature I take the warre leavied by *Harold* against the Conquerour to be, wherein the greatest part of the Kingdome was never engaged, nor therefore did it feele the dint of the Conquerours Sword at all; and in this case the Militia must

must be allowed to such as beare the purse: nor can it be concluded to be the Militia of the Kingdome, nor any part thereof, although it may connive thereat. But to set this consideration aside, as not coincident at all with the Norman engagements after they were crowned, and to take all the subsequent warres to be meerly defensive of the right of the Crown, as in sober construction they will appeare to be: as touching the levying of money, its evident that it lay onely in the power of the grand Councell of the Kingdome; for otherwise the laws were setled that no Tax should be made or taken, but such as were due in the Confessors time, as formerly hath been shewed. Secondly, for the preparing of men and munition, it was done either by tenure or by speciall law; as touching tenure, it was provided by way of contract, that those that held by Knights service should be ready with their Armes to assist the King for the defence of the Realme: So as they were not bound by their tenure to ayd him in any other cases. Others were also by especiall law of the Land bound to be ready for their service in that kind: For all the inhabitants of this Kingdome held their estates under a generall service, which by common right they are bound to performe, viz. in time of danger to joyn in defence of their Countrey: This is the common fealty or allegiance which all men owe; and which if neglected or refused, renders the party guilty of treason against his Countrey, and his estate under the penalty of forfeiture, according to the old Saxon law revived and declared by *Henry* the first. Thus the law made preparation for the war, both of men and Armes. Castles and Fortswere likewise either first made by the order of the grand Councell, or otherwise allowed by them for the defence of the Commons, and the Kingdome; so was the law of *William* the first. The levying and manning of the warre must not be denied *de jure* to belong to the representative body, so farre as may consist with the directory part, for that it is a maine part of the government of the Kingdome in times of warre: And therefore *Henry* the first, amongst his laws made in the ordinary course of law making, provideth for the ordering of men in the army in the field, and established a law, that such

Ll. Gulielm.
cap. 57.

Ll. Gulielm.
c. 59.

Ll. Hen. 1. c. 13.

Ll. Gulielm.
61.

Ll. Hen. I. c. 13.

as forsooke their colours or associats in the field, during the battell, should be punished with death, and forfeiture of is whole estate. Nor yet can it be denyed but that *de facto* Kings of their own accord, and by secret Councell did direct therein; either in the vacancy of Parliament, which was the generall case of the first times of the Norman Conquerour, and the whole reigne of *William Rufus*; or by connivance of the grand Councell, while they saw nothing done but what was well done. Nor can it be rationally said that Kings by such advice as they have (in the recess of the grand Councell) levying warre in defence of the publike, according to rules, doe otherwise then their duty; or if the grand Councell looke on, see nothing misgoverned, and say nothing, that they doe other then is meet; For it must be remembred, that Kings in their first originall were rather Officers for warre, then peace; and so are holden by all Antiquity, and as Generals in warre were called *Reges* or *Imperatores* by the Grecians, Romans, and Germans: and at such times as warre was concluded, at the generall meeting of the people they chose their *Dux* or *Rex*, call him which you please; and he being chosen, all bound themselves to be at his command, and to defend his person: so as while a King keepeth within his place, in time of danger its his duty first to stirre himselfe, and stir up the rest; to lead them and order them, as may be most for the publike defence, and to governe the Army by such Lawes as are or shall be established by order of the publike meeting, and in case of sudden exigences to use his own wits; and in all this is the common liberty no whit infringed, in regard that all is for the publike defence, to which the Knights are bound by their tenures, and all others by the law. And this was this Kingdomes case in the Normans time, that both Leaders and soldiers, whether by election of the people, or prescription, yet all served for the defence of the Kingdome. Nor were they compellable to any other service inconsistent therewith, nor to stand to any judgement in such cases differing from, or contrary to that of the Parliament it selfe.

CHAP. LV.

That the entry of the Normans into this Island could not be by conquest.

THat in point of fact the entry of the Normans into *England* was not by Conquest, will sufficiently appeare from what hath been already noted. I shall make one step further, and shew, that as affaires then stood with the Conquerour, it was impossible for him to merit that name against the stream of providence, that had preingaged him to three sorts of men, *viz.* the Normans, the Clergy, and the Commons of *England*.

It must be taken for a ground that Duke *Willam* must give all faire correspondency to the Normans, considering they are members of his own body, and the arme of his strength, without which he could doe nothing. And its not lesse certaine, that however the Sea divided the two Countries, yet long before the arrivall of the Army, the Normans and Saxons were so well acquainted by the latter accessse of the Danes, that partly by marriage and other interests the Normans made so great a party in *England*, as that party merited no lesse from the Duke in his enterance, then those he brought with him; and therefore both they and their allies in all reason must expect such reward of their faithfulness to him, as the other had; nor could the Duke deny the same, unlesse he had disclaimed his own interests, whereof he had none to spare. Secondly, their merit from the Duke was accompanied with no lesse mutuall relation to his Army, being of the same blood with themselves, and of ancient acquaintance, and as impossible for the Duke to keep them from consociation with the mixed people, as to abstract the mixed people each from other; one or both of which must be done, and the Conquerours must be kept from incorporating with the conquered, or else the law of conquest cannot hold. Thirdly, if these two had failed, yet

M. West.
An. 1072.
Ll. Gulielm.
c. 55.

Ll. Hen. 1. c. 13.

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M. West.
An. 1072.
Li. Gulielm.
c. 55.

had the Duke by his manner of rewarding his Army disabled himselfe from holding, however he might seem to have by conquest. This was his gift of Mannors, Lands, and Franchises unto his souldiers, compleated with their ancient rights, and priviledges in free service; otherwise it had been little better then a trap to bring his own men into bondage, who but lately were free souldiers under no better then a Duke of their own election; and their government in their own Countrey, however big, yet had not yet brought forth a soveraignty into the world; their Duke no compleat King, nor themselves so mean as vassalls; and it was equally difficult for him to get up higher, as for them to stoop lower: And however, it was dangerous now for the Duke to try masteries, unlesse he meant to hazzard all, and to change the substance for the shadow. Lastly, to lay them all aside, and to take the Normans as in themselves considered, a people under such laws and customes as were the same with the Saxons, and originally in them; and from them derived into Normandy by *Rollo*, or some other; or take them as a people willing to lay aside their own law, as some writers affirme, and more willing to take up the Danish customes, which were also very nigh a kinne to theirs, and in part settled by the Danes, in that part of the Kingdome where themselves most resided. It must be concluded, that a government by law was intended, and such a law that was no way crosse to the fundamentall laws of this Kingdome, but concurring therewith; In every of which regards the future generations may justly claime their immunities as successors and heires unto the Normans, albeit no Saxon could have enjoyed or derived the same to posterity.

A second sort of men that made the King incapable to hold by conquest was the Clergy, a considerable part of the Kingdome in those daies, whenas in every Nation they grew checkmate; and in this Kingdome had well nigh the one halfe of the Knights fees, and thereby a principall part of the strength of the Kingdome, besides the consciences of them all; and for a reserve they had the Pope in the reare, whose power in every Kingdome was little inferiour to that of the Kings owne, and therefore sufficient to stop an absolute conquest, unlesse it were

first

first conquered. But the King came in upon great disadvantages in both these regards : For whereas his pretence upon his entry was to advance justice principally toward the Clergy, who formerly were wronged by *Harold* or voiced so to be, this bound him from injustice and oppression ; and furthermore the Pope had him in a double bond ; one as Prince of the English Clergy ; the other as Judge of the title of the Crown by the Kings own election ; and that by sentence ; for the King had merited of him, if not to hold the Crown it selfe by fealty to the Roman See, yet by such services, as that the tripple Crown should be no loser. The King therefore must resolve to have no more to doe with the Church then will stand with the Popes liking, unlesse he meant to adventure himselfe and all he had into the danger of the great curse, of which the King would seem more sensible then perhaps he was. Nor were those times of the Church so moderate, as to bring forth Churchmen that would catch the good will of the Laity by condescension, or Popes of that height of perfection as to part with one tittle of their great Titles, muchlesse ought of that pitch of power which they had griped, though it would save the world from ruine. — In all which regards the Norman Duke was too far inferiour to attaine by conquest any thing in this Kingdome, wherein the Pope or Clergy claimed ought to have or doe.

A third sort of people avoided the dint of conquest either by timely siding with the Norman, or by constant resisting of him, or by neutrality. Of the first sort were many, both Lords and others, that by affinity and consanguinity were become Englishmen to the Norman use ; others were purchased thereunto by the Clergy, that were zealous for the Popes honour, that was engaged in the worke. Of those likewise that were resolute in the defence of the liberty of their Country there were not a few that purchased their liberty, who otherwise might under pretence of treachery have forfeited the same to the rapacious humour of the Conquerour ; and this was not done onely by valour, for *Normandy* stood in a tottering condition with their Duke ; partly drawn away by the French, that feared the Duke would be too strong for them ; and partly declining

Hoveden lib. 6.

Ingulfus 512.

Gloss 227.

clining their own further ayd, least their Duke should be too great for the Dutchy. It was therefore wisdom in the Conquerour to settle the English affaires in the fairest way to gaine them for himselfe, who had been so brave against him. But the greatest number, especially of the commons, looked on while the game was playing, as contented with the cast of the Dice, what ever it should be. These were afterwards by the King looked upon, not as enemies (as the president of *Edwin of Sharnburne* witnesseth sufficiently) but upon such as either were or by faire carriage would be made his friends; and therefore he concluded them under a law of assurance, that they that had been so peaceable, should have, and enjoy their Lands as intirely and peaceably as they had formerly done before his entry. To conclude therefore this point: if these three parties of the English Normans, the English Clergy, the stout English, and the peaceable English be set aside from the title of conquest, it will be probable that not one tenth part of the Kingdome were ever under other change then of the Governours owne person.

CHAP. LVI.

A brieve survey of the sence of Writers concerning the point of conquest.

THe clamours in story that the Conquerour altered and made laws at pleasure, brought in new customes, molested the persons and estates of the people with depopulations, extortions, and oppressions, and others of that nature have made latter times to conclude his government to be (as of a Conquerour) meerly arbitrary, and that he did what he list: how different this conclusion is from the intent of these Writers I know not; but if the Kings title and government was as a Conquerour, then was his will the onely law, and can administer no cause of complaint of wrong and oppression; and therefore if these be taken in nature of complaints, they

they declare plainly that there was a law in title, or else there could have been no transgression or cause to complaine. But if the Reader shall apprehend these passages in Writers to be no other then sober relations, then were it not amisse to consider from what sort of men these complaints or relations doe proceed, viz. from Writers that have been cloystered men, little seen in affairs of State more then by common report and rumour; prejudiced by the Kings displeasure against their Cloysters, and therefore apprehensive of matters in the saddest sence, and many times far beyond the truth, and might as well be supposed to misrelate, as to mistake. For if we shall touch upon particulars, I thinke no man will deny but the King allowed property indifferently, as well to Normans as English, if the premisses be rightly considered: and therefore though somewhat be true of the plundering of houses of Religion, persecuting of the English Nobility, deposing of Bishops and Abbots, whereof they speake; yet all might be deservedly done in a legall way, and in execution of justice, whereof Histories are not altogether silent; Neverthelesse, if in the prosecution the King did shew a kind of rage, and some rashnesse, it might be imputed to the common infirmity of great men; for as oppression upon those that are inferiour, makes them mad, so doth treachery against them that are superiour make them little other; especially if they be overtaken with a fit of passion in the instant, or their minds wrapped into a whirl-poolle of affaires.

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But the change of laws makes the greater noise; wherein what change they suffered, may appeare from the premisses, if Writers have delt uprightly; Otherwise generall imputations without particular instances will never sway opinion contrary to the currant of the laws that are published, especially seeing we have observed the error of the best Historian of those times, in calling those things new which were anciently used in *England*, before *Normandy* was in a condition of a state. Yet if this should be granted, and that there were such change of laws as is pretended, it makes nothing to the point of conquest, so long as the new laws are made by advice of common Councell, and for the common good; and so long as they are

2.

are established to be rules for government. I remember it affirmed by some of those ancient Writers, that the Duke or King would have brought in the customs of *Norwey*, but the earnest mediation of the English prevailed against it; and it evinceth two things to my opinion: first, that there was question made what law should be established. Secondly, that notwithstanding the interest that the Normans had in the Kingdome, they could not prevail to bring in the whole body of their law, or of the customs of *Norwey*, which were not only the *prima materia* of their law, but also in kind had a settling at that very time in those places of this Kingdome where the Danes had their principall seate; and therefore not altogether strange to the Saxons themselves. The summe of which will be this, that upon debate a law must be settled, and that not the law of the Conquerours own will, nor the law that suits with his desire; but the ancient law of the Kingdome; and therefore if at any time the unquietnesse of some of the English brought the King to some thoughts of arbitrary rule, and to shake off the clog of Saxon law; it was long ere it stirred, and sprang up too late to raise the title of conquest; and withered too soon to settle it.

As touching the change of customs (for that also is imputed to the Conquerour) it cannot be denied but some alteration might be in matters of smaller consideration; yet are the Writers not without mistake in the particular instances; For whereas they tell us that the Conquerour tooke away the custome of Gavell kinde, and brought the custome of descent to the eldest sonne; and that *Kent* saved their liberties and continued this custome of Gavell kinde; I shall not contend about the liberties of *Kent*, but must till I see better reason hold the opinion of the change of inheritance to be a meere conceit: For (besides what hath been already said concerning that custome of Gavell kind) if we believe *Glanvile*, the difference was between Lands holden by Knights service, and in socage: the first of which in his time by ancient custome alwaies descended to the eldest: and those Lands that were holden in Socage (if not partible by custome, in which case they went equally to all the sonnes) went by custome in some places to the

the eldest, in other places to the youngest; so as the rule of inheritance in the Norman times was custome, as well as in former times. And furthermore, if the custome of Gavell kind had been the generall custome of this Nation, the King by his change had contradicted his own Prerogative, and granted as great a liberty to his subjects as could have been invented: For had the custome of Gavell kind happened upon the Lands in Knight service, it had brought all the sonnes under the law of Wardship, and had made a ready way to intrall all men of worth, and undoe all husbandry; the first whereof had been as advantageous to the Kings private interest, as both destructive to the publique.

Nor is it cleare from any Authour of credit, that the Normans changed the tenures of Lands; albeit that it cannot be denied but such Lands as he had by forfeiture, or otherwise, were in his own power to dispose upon what tenure he pleased; for as well before the Normans time as long after, tenures were like as the services were, all at the will of the donor; and were of as many individuals almost as the minds of the owners; some being of more generall regard and publique use, are recorded amongst the grounds of English laws; none of which appeare to me to be of Norman originall, although they received their names according to that dialect. 3.

The next thing objected is the change of Language, which thing some Writers tell us the King endeavoured; or which is worie, to be so absolute, as to be absolute tyrant, and to publish laws in a forreigne language, that the people through ignorance might the rather transgresse, and thereby forfeit their estates. This (if true) so far differed from the nature of a Conquerour, as rather proveth that he was put to his shifts: Neverthelesse the thing tasteth so much of spleen, as it might occasion distrust of other relations concerning this subject: For besides that it is nonsense for a Conquerour to entitle himselfe by a cheat, where he hath an elder title, by conquest; I shall in full answer to that calumny insert a passage of an Historian that was in the continuall view of publique affaires in those times, who speaking of the Conquerour saith, That he commended the Confessors laws to his Justices in the same 4.

Ingulfus.

M. Paris:
fragm.
Gulielm.

Language wherein they were wonted formerly to be written, lest through ignorance the people might rashly offend. And another Authour saith, that the King had a desire to learn the English tongue, that he might the better know their Law, and judge according thereto. Its probable neverthelesse, that the laws were in the Norman tongue; and its no lesse likely that the pleadings, in reall actions especially, were also in the same Language; else must the Normans be put to schoole to learne English, upon perill of losse of their estates: but that either the written laws were wholly concluded into the Norman Tongue, or that the publique pleading of causes by word of mouth in all actions where the issue was left to the Countrey, were in any other Language then English, no advised Reader will conceive: seeing it had been a madnesse for an English Jury to passe their verdict in any case wherein its likely many of them understood scarce a syllable of the Norman language, muchlesse ought of the matter upon which their verdict should be grounded. Adde hereunto, that its not likely but the Conquerour inhibited the use of the English language in all matters of publique Record, in as much as the Charters made by him to corporate Towns and Franchises were sometimes in the Saxon, more generally in the Latine, but seldome or never in the Norman dialect; and that pleadings and indictments were entered in like manner in the Latine Tongue (as formerly by an old custome brought in by the Clergy was used) for the Clergy, who had gotten the Key of knowledge and Law into their own custody, layd it up in that Language whereof the Commons had little knowledge, that they might thereby be enforced to depend upon these men for justice, as well as for piety. The Normans therefore either found it too hard to alter the former custome in such cases; or else thought it the wisest way to choose the Latine as a third Language indifferent as well to the Normans as Saxons, and best understood of any forreine Tongue besides: and yet endeavoured to bring both peoples into one Language, as they were intended to be one people; and to presse the use of the Norman Tongue in publique affaires, so farre as might consist with good government and justice, leaving time and occasion to worke the issue, which

which doubtlesse was much, and had been more, had the Norman race continued in the Throne. But falling out otherwise, the English blood prevailed in the head, and the Language continued possession, mixed onely with some Norman words, as the people were also a mixed people. So as the Language was changed, though it was altered.

Lastly, its affirmed that the Normans did impose a new custome called Coverfeu; and its thought by some to be a meere vassalage, that every man at the noise of the Bell every night must put out both fire and Candle; and yet is a matter of so small concernment, that (of being in its own nature convenient) *Scotland* received it without such coercion; and can be reputed for no other then a seasonable advice, which any Corporation in time of danger might order within their own Precinct, without transgressing the liberty of the subjects. Of lesse consequence is that change, which is alledged was brought in by the Normans in the sealing of Deeds of conveyance, by setting a print upon Wax annexed to the Deed, which formerly was wont to be by setting a print upon the blanke at the end of the Deed; and yet its looked upon by some as a trophée of conquest or absolute government: concerning which, I will not dispute whether the Normans first brought in this course, but shall rest in this, that the King being about to compleat the unity of the Laws in the superstructure as well as in the fundamentals, if herein and in some other particulars the English submitted to the Normans, they likewise stooped to the English Law in other things: and therefore such concurrences ought not to be imputed unto a conquering power, but unto moderation amongst a company of wise men.

Thus having glanced at the changes of Property, Lawes, Tenures, Language, and some customes, we come to that which is the maine occasion of all these complaints, I meane unlawful Taxes, afforsinges, and other such oppressions upon the estates of the people: concerning which I purpose not to contend, for much thereof is like to be true: the Norman Kings (especially the two *Williams*) being under continuall occasion of expence, many warres, more provocations, which kept them ever in action, and that wrought their spirits into

Hoveden.

an immoderate heat, little inferiour unto rage; and so they might soon outreach their bounds, and sit heavy on the people; and in such occasions no man escaped, Norman nor English, Clergyman nor Layman; nor did the Kings themselves come off such gainers, but that they might sometimes put up their gettings into their own eyes, and see never a whit the worse. And yet to doe them right, they were not alwaies of such sad influence, but had their *lucida intervalla*; especially he that had the least cause, I mean the Conquerour, who certainly was a man of a serious regard, and did not onely remit sometimes his rigour in exacting where he ought not, but also forbare to require that which he had some colour to demand: for whereas the Danegelt was left unto him in the nature of an annuity, he was contented to turne it into a summe in grosse, and to demand it onely *Cum ab exteris gentibus bella vel opiniones bellorum insurgebant*; and it was then done *consultis magnatibus*. These things thus considered, might have mollified somewhat the Pennes of angry Writers; and where they faile, may be caution to Readers to consider occasions and dispositions of Princes; and so long as Laws hold in title, to construe the irregularities of Princes to be but as steps out of the path to avoyd a little dirt, that a man may get home the more cleanly; and therefore rightly can derive no other title of absolute soveraignty to their successors then to hold by infirmity. And thus the Government under the Normans at the worst was but like that of childhood, following sudden and present desires; not wise enough to plot for absolute Monarchy, nor to keepe off a polity, which still rooted underneath, though the fruit, while it was now green was harsh and unpleasant.

I shall conclude this Norman discourse with this advertisement, that notwithstanding the words *Conquerour* and *Conquest* have often fallen from my Pen, and hereafter may doe the like, yet can I see no reason why divers succeeding Kings coming to the Crown by argument of the Sword, and not by right of descent, may not deserve the Laurell as well as the first Norman King; onely because fame hath fancied him that Title, under a kind of prescription I do the like.

CHAP.

CHAP. LVII.

Of the Government during the Reignes of Steven, Henry the 2. Richard the 1. and John. And first of their Titles to the Crown, and disposition in government.

I Have cut out this portion of one hundred twenty and five yeeres (containing the reignes of these Kings) apart from their successors, in regard of their titles; all of them being under one generall climate, and breathing one ayre of election, and compact between them and the people. Now was the issue male of the stocke of *Normandy* quite wasted; I meane in relation to succession by inheritance: for although it was the lot of *Henry* the first to have many children, yet it was not his happinesse to have many lineal; nor to hold what he had; nor of them all was there left above one that might pretend to the Crown, and it a daughter, who was the great Grandmother to all the succeeding Kings till this day. Onely King *Steven* like an unruly ghost comming in upon the Stage *Steven.* troubled the play during his time. This daughter of *Henry* the first was married to the Emperour *Henry* the fourth, and surviving him was in her fathers life time acknowledged to be his heire; (the Sea having formerly swallowed up the remainder of his hope) unto her the Lords sware fealty as to the next successor in the Throne after the decease of her father, being led thereto by the instigation of her father, whose conscience told him that the Title to the Crown by inheritance was weakned by his own president, himselfe comming to the same by election of the people, contrary to the title of his brother *Robert*. Neverthelesse this was not the first time that the English Crown refused to be worne by practice; for *Henry* the first being dead, *Steven* the younger sonne to a younger sister of *Henry* the first put up head; who being of the Royall stemme, a man, and a brave Souldier, by the ancient,

ent course of the Saxons, had title enough to be thought upon in a doubtfull succession. Besides, he was a rich man, and had enough to raise up his thoughts to high undertakings; and a Brother, a Bishop and Legate to the Pope here in England; one who was of a high spirit, and vast power; advantages enough to have quickned a much duller spirit then his was, who was the sonne of a daughter to *William* the Conquerour; and to make him yet more bold, he had the upper ground of the heire, who was a woman, disadvantaged by a whispering of wilfulnesse, and customary government like an Empresse; which was too high a saile for an English bottomie, wherein so precious a treasure as the subjects liberties was to be shipped. Thus provided, *Steven* stepped up to the English Throne, and with protestations of good government entered and made up the match both for Crown and Scepter, the people waving the title both of Empresse and heire; the pretensions of the E. of *Blots* elder brother to *Steven* gave way to the common law and liberties of the subject to fasten root and gather recompence after the violence of the Norman blasts was out of breath; thus making way over hedge and ditch of all Oathes, till the King was quietly seled in the Throne.

Quietly, said I? that I must retract; for he never had 'quiet during his life, though generally was victorious, and did as much as a King could doe that had the passions of a man and Souldier, to give the subjects content. The true cause whereof was an errour in the tying of the knot; wherein he neither became theirs, nor they his: For the fealty that was sworn to him was but conditionall and *consequē*; and yet the Kings promises were absolute, and better observed then the peoples were, possibly because his engagements were more. For besides his protestations, the King pledged his brother the Legate to the people, and morgaged himselfe to his brother; and to boot gave both to the Clergy and Barons liberty to build and hold Castles for their private security: the issue whereof may mind, that too much countersecurity from the King to the people is like so many Covenants in marriage, that make room for jealousie, and are but seeds of an unquiet life; and thus it befell

this

this Kings reigne. His first troubles are brought in by Historians, as if they dropped from Heaven, yet probably came immediately from without, *viz.* from beyond Sea where the Empreſſe was: for as the Kings engagements were in their first heate on the one side, so was also the Empreſſes choler on the other side, and therefore might make the first assault; and the Kings first successe therein falling out prosperously for him, conceited him that he was strong enough to encounter his own Covenant, although in truth he invaded but the skirts thereof; I meane that collaterall security of Castles: for by experience he now fees that they are blocks in his way, he must therefore have them into his own power. But the Clergy are loth to forgoe their pawn till they had their full bargaine, (for now they were working hard for investures of the Mitred Clergy under the patronage of a Legate that had the King in bonds) acted their parts so well as they ingaged the Nobility for their liberty of Castles, in which atchivement the King was taken prisoner. The Empreſſe betakes her selfe to the Clergy, and by the Legates meanes procures a kind of election to be Queen; but she sicke of the womans humour, and thinking too much of the Empreſſe, and too little of the Queen; and forgetting that the English Crown would not fit an Empreſſe, unlesse she could fit her head first to it, choked her owne title by prerogative, and so let the Crown slip through her hands, which fell upon the head of *Steven* againe, who maintained it by his Sword, after by composition, and then died a King; and thus like a vapour mounted up by the Clergy, tossed by tempests for a time, and at length falling, gave way to the Crown to have its free course to the Empreſſes son by *Geoffery Plantagenet*.

This was *Henry* the second, the most accomplished for wisdom, courage, and power, of all his predecessors, and one that wanted nothing but purpose to have undone what the foregoing Princes had done, in the setting of the liberties of the people; for the subjects were tired with the unquiet former times, and the Clergy in distraction through the Schisme in the Popedome between *Victor* the fourth and *Alexander* the third;

Henry 2d.

third; and very unfitting all were to dispute the point of prerogative with so mighty a Prince. And it was the wisdom of God to order his affaires so, as that he was not very fit to dispute with the people in that case: for his title to the Crown was not very excellent, being neither heire to the last King that reigned, nor to the last of that title, I mean to *Henry* the first; but sonne onely to the Empresse, who was now alive, and by descent was to be preferred before all other. His title therefore is clearly by compact and agreement made between the Lords, King *Steven*, and himselfe, all being then ready to try the right by the Sword to that to which none of them had any right at all at that time, but by the favour of the people. Nor did the King ever after dispute the strength of this title, although before he died, his mothers death conveyed over to him what right of descent soever was consistent with the Law of the Crown; nor did occasion favour him thereto: for as its never seen that any man is honoured by God with many advantages, without proportionable imployment for the same; so it befell with this King; His great Territories in *France* brought jealousie in the reare; and it strife and contention with *France*, enough to turn his thoughts from waxing wanton against his own people: and therefore his wisdom taught him to preferre peace at home to the chiefe of his prerogative; to become somewhat popular, and yet to loose nothing of a King thereby; his way was to keepe the Church men down, that had during his predecessors time grown, whether more obstinate against the King, or insolent over the people, is hard to judge; and in this he had the people to friend; and might have prevailed much more then he did, but that the people feared the threats of *Rome* more then he; and himselfe (if not guilty of *Becketts* death) more the conceit of fame then there was cause: these concurring with unnaturall troubles from most unthankfull sonnes, made that spirit of his to faile that formerly knew no peere; as its often seen that the most generous spirits are sooner quelled with shame and griefe, then with feare of any danger whatsoever. Towards his Lay-subjects he was more regardant for the setting of Laws, and executing

ting of justice, so as some have thought him the first wombe of our English laws; others more truly the first *Mecænas* since the conquest that brought on the spring time of a settled Common-weale, and thereof left this faire testimony by his putting forth that Primrose of English laws, under the name of *Glanvill*, letting all men know that thenceforth *England* would no more vale it selfe in an unknown law, but explaine it selfe unto the World to be a regular government, such was the Kings Idea; yet was he touched with so much of the common infirmity of Kings as shewed him to be a man; especially in his old age, being loaden with military affaires, wherein he had been long exercised, he had contracted some shifting courses of a souldier in gathering money, and souldiers somewhat out of the rode way of an English King, and led an ill example to future ages: nor had he other salve for this wound, but that it was for the honour of Christian faith, and for the sake of *Jerusalem*.

Hoveden. 348.

Next comes in *Richard* the first, *Henry* the seconds sonne both in birch and courage; yet was his behaviour to his father such that his meritorious holy warre could never wipe it out of the Callender of story. His entrance was upon an election made in his fathers life time, and the same confirmed by receiving of homage from the Peeres. The sad troubles that this election amongst other things occasioned to his father in his old age show plainly that *Richard* trusted not to the title of inheritance; nor the French King (that tooke his part) unto the English custome, for the possession of the Crown; but all must be done in the life of the father, that must secure the government to the sonne when the father is dead: and thus is he entred upon the Throne, not as heire, but as successor to his father, yea rather as survivor, taking possession of what was by speciall compact conveyed to him by the means of his father in his lifetime, though sore against his will, if writers speake true. As his entrance was, it promised a better government then followed: for though it was for the most part hidden in the wombe, as himselfe did subsist in an other world, yet by a secret providence he was given over to the election of ill depu-

Richard the first.

M. Paris.

ties ; and therefore he was not welbeloved , however deere he was to this Nation. A third part of his government was spent in a calm with Pope, Clergy, Commons, and all Nations that were not Infidels, upon conscience it seems that he ought not to be troubled who adventured his person so bravely in the holy warre. But above all he was the Clergies darling, not onely for his adventure in the holy Land, but now much more in his returne by his imprisonment in *Germany* ; and therefore they stucke close to him in his absence, not onely in maintenance of his right to the Crown (whereto some made claime, and his own brother *John* did more) but emptied themselves to the utmost for his delivery, which they effected to the envy of the French, and such as longed for his downfall here in *England*. The King comes like the Sunne rising, scattering his brothers designes by his very view ; then returns his thoughts for *France*, where he spent the rest of a restless life, and as his entry upon the Throne was unnaturall (for he made his way upon his fathers Hearse) so was his reigne full of troubles, and his end not unlike ; for it was violent, and by the hand of his own subject ; and so ended his reigne that scarce had any beginning.

John.

Next comes in King *John* to act his part according to his entry hand over head ; whether called by a people scared with the noise of succession by inheritance, or such as thought it not convenient nor safe in a stirring time to have a child to be their King ; or lastly, led by an interest that *John* the youngest sonne of *Henry* the second had by wofull experience obtained amongst the Lords, or some or all concurring ; its cleare they crossed the way of inheritance, waved *Arthurs* title who was heire to *Richard* the first, and by him also appointed to succeed, being then but a child ; and they chose *John*, a man of warre, trained up in the government of *Ireland*, which made way for his active spirit ; and well seen in the government of *England*, which might have made him wise : and under these conceits were willing to forget his oppression in *Ireland*, his treachery against his Lord and King in *England*, set the Crown upon his head, and in conclusion acted the Tragedy of *Abimelech*

leb in English, wherein the Cedar was rooted up, and the Bramble troden down.

The generall temper of his government sheweth that though the King must be thought sober, yet the man was mad; for he hauked at all manner of game, *France, Scotland, England, Laity, Clergy*, spared not the Pope himselfe, scorned to stoop to occasion; all which he did by the strength of the name of a King, till at length being well cust and plumed, he was faine to yoke his lawlesse will under the grand charter, depose his Crown at the Popes foot, and instead of a King became little better then a chiefe Lord in *England*. Thus although *Richard* the first forgot this mans disloyalty, yet God remembred it: for the King having gotten the Pope upon the hip, and put him to his last shift to stirre up the French to set his curse on worke was by an hidden providence conquered in the midst of a Royall Army, without view of enemy, or other weapon then a meere noise; his Nobility (either suspecting all would be gone to *Rome*, or expecting that the King would not deny them their own, seeing he had been so profuse in giving away that which was not his) demand that their liberties might be confirmed; but he being loath to be mated by his Nobles, though he was overmatched by the Pope, armes himselfe with the Popes curse, and the Lords themselves with the French mens power: thus the tables are turned, and the French playing an after-game to gain to themselves the Crown of *England*; after they saw the death of a Warlike King discovered their designe before it was ripe; and in the conclusion were beaten out of the Kingdome by a child.

Its not worth inquiry what the King allowed or disallowed; for it was his course to repent of any thing done contrary to his present fence, and made it his chiefe principle in policy to have no principle but desire; wherein he triumphed too long by reason of the contentions between the Clergy and the Laity, which comming nigh unto the push of the pike, and the King ready for the spoile of both; the Barrons and Clergy suddenly close their files, and like a stone-wall stood firm to each other till the King wearied with successteffe labour

M. Paris
An. 1215.

was glad to give and take breath, confirmed the liberties of the people by his Charter, which is now called the *Magna charta* for substance; and gave such collaterall security for performance on his part as did let the world know the thing was as just as himselfe had been unjust: The worst point in the case was that the people got their own by a kinde of redissei-
fin; a desperate remedy for a desperate condition, wherein the Common-weale then lay between life and death upon the racke of the will of a King that would be controlled by nothing but his own appetite, and was in the end devoured by it.

CHAP. LVIII.

Of the state of the Nobility of England from the Conquest, and during the reigne of these severall Kings.

UNder the title of the Nobility of England I shall comprehend all such as are of the greatest eminency for birth or wisdom and learning, and advancement into place of government and honour. These were in the Saxons times the flower of the people, flourishing onely from the honour that ascended from beneath their deportment then was full of cheere and safety to the people: after that royalty sprung up, the influence thereof upon them exhaled such a reciprocall interest backe againe as made them lesse regardfull of their own roote. Whereas we see the more mature flowers are the more propence to turne head and looke downward to their own originall. This distemper was yet much worfe by the coming in of the Normans, whose Nobility, besides their titles of honour in their own Country, obtained by custome such command and power amongst the meaner sort, being souldiers under them in time of the service in the field; that when the warres had breathed out their last, neither of them could forget or were very carefull to lay aside. This was observed by
Kings

Kings, and advantage espied to clime to the top of Monarchy by the helpe of these great men, whom if they could make their own, all would be theirs; and wherein they had prevailed much more then they did, if they had been wise enough to have maintained them in unity; but in that failing, Kings were necessitated to take parties, and serve the Nobility to save the maine: and thus continued they a considerable party in the government of this kingdom from the Normans for the space of two hundred yeeres well nigh, to the prejudice both of the growth of the prerogative of Kings and liberties of the Commons; and benefit of none but the Lords, who in those unquiet times were the chiefe Commanders in the field. This error of Kings was soon espied, but could not be avoyded; its naturall to man to be proud, and to such to fall into contention: another course therefore is taken, *viz.* to raise up some so high as may overtop all, and keep them under; nor is it altogether without reason, for Kings are no ubiquitaries, and some must beare their power where they cannot be personally present, yet it is dangerous to bestow too much upon one man; for there is no man fitting to be a King but himselfe that is a King; and where kings are immoderate in bestowing power, it many times workes much woe to the people, and not seldome sorrow to the Kings themselves. The place of the chiefe Justice was in shew but one Office, yet in these times was in nature of the Kings Lieutenant-generall throughout the kingdom. A power and worke too great for any one man in the world, that can make no deputies to mannage it; and yet in those times you shall meet with one man made up of an Archbishop, a Legate, and chiefe Justice of *England*; or a Bilhop, a Lord Chancellor, a Legate, and chiefe Justice of *England*; and a strange kind of government must that needs be wherein the servants Throne is above his masters, and a subject shall have a plenitudinary power beyond that which his Lord and King was, as the times then were, was capable of. By these and such like pluralities the great men of *England* kept the Commons below and themselves above, and probably rendered the temper of the government of this kingdom more

Aristo-

Hoveden 443,
375.
Nubr. lib. 4.
cap. 14.

Aristocraticall then in after ages. And if their personall authority was of such value, how much rather in their joynt assembly or court of Councell; concerning which I must agree that as in their originall in *Germany* they did consult and determine of the meaner matters, that is to say, of matters concerning property, and therefore were in their most ordinary worke meetings of Judges, or Courts of Judicature: and also matters of defensive warre, because themselves were the Commanders: and lastly, in matters of sudden concernment to the State, not onely to serve as eyes to foresee, but to provide also if they can, or otherwise to call in the ayd of the peoples advice; so also they continued this course, and it may be now and then (as all Councels have done) strained their endeavours beyond their reach (especially since the Normans entrance:) and therefore I shall not deny but that they alone with the King, and without the Commons, have made many Laws and Constitutions, some of which now are called Statutes, (although many of them in truth are no other then rules for Judicature, which ordinary Courts may frame; or Judgements in particular cases, such as are the constitutions at *Clarendon* in *Henry* the seconds time) and many other Laws which are reported to be made between the King and his Lords. Nor can I looke upon such laws otherwise then as upon judgements in Courts of Justice in new points of controversie, grounded upon ancient grounds, which properly are not new Laws, but the ancient rule applied to new particulars; and being so published to the world, may beare the name of Laws, Ordinances, Constitutions, or Judgements; the word Statute being of later times taken up and used in a more restrictive sence, of which more in their due place. Now that this Court was a settled Court of judicature, and so used, may appeare in that fines were leavied therein, and Writs of right determined; as in that great case between the two Kings of *Navarr* and *Castile*, referred to the judgement of *Henry* the second, and tried in this Court; its said that the triall was by plea, and if need were by battell. The Judges in this Court were the Baronage of *England*; for the entry of judgement in that great case is thus,

Comites

Hoveden.
An. 1175.

Ibid.

Comites & Barones Regalis Curie Anglie adjudicaverunt, &c. so as though doubtlesse many were absent, some being enemies, others discontented, others upon other occasions, yet all might claime their votes as Barons. The President over all the rest was the chiefe Justice, or if the King were present then himselfe; and by him was the sentence or judgement declared, according to the entry in the case aforesaid, *Habit, Concilio cum Episcopis, Comitibus & Baronibus adjudicavimus &c.* The honour of this Court was great so long as the Lords had liberty or care to attend thereon: but when Kings began to have private interests they would have these to be more private Councils, which weakned the esteem of conclusions that there passed, and reduced the honour thereof scarce to the degree of a Conventicle; and by this means the necessity of calling together the whole body representative was made more frequent, the power of the Nobility of England decayed, and this Court forfeited all its juridicall power to the three Courts at Westminster, viz. the Kings bench, Common pleas, and Exchequer; saving still the supreamie judicature unto the grand Convention of Estates in Parliament, where all the Lords had liberty of meeting, and free voting without impeachment.

CHAP. LIX.

Of the state of the Clergy, and their power in this Kingdome from the Normans time.

IF the prerogative of Kings prevailed not to its utmost pitch during the Normans time, it did much lesse in these times succeeding, wherein the Clergy tooke up the Bucklers and beate both King and Commons to a retreat; themselves in the interim remaining sole triumphers in the field. In their first adventure they paced the stage, no man appearing to oppose: Steven then was King by their leave, and their Bondservant; and they might have any thing sobeit they would suffer him to enjoy

enjoy his Crown. His brother the Bishop was the Popes servant, the Churchmens patron, and the Kings surety; in whom the Clergies favour to the King, and his good behaviour toward them and all men concentred: Besides all this, the King was but so upon condition, and there being no better title then election, conscience in those times was well enough satisfied in the breach of covenant on their part; where on the Kings part it was first broken. All this the King saw full well; and therefore what can he deny to such benefactors? Vacancies of Churches he readily parts with; and his right of investiture of the Mitred Clergy he dispensed: so as he opened the way to his successors of an utter dereliction of that privilege. He sees his brother the Legate despoil the Crown of *England* by maintaining appeales from the Courts in *England* unto the Court of *Rome*, and he says nothing; he is contented with the flumpe of the Crown, and (with *Saul*) if he be but honoured above or before all others of the people, its his enough: But the Clergy, like the barren wombe hath not yet enough. The King hath allowed them Castles, and too late he sees that instead of being defencas against the Imperiall power of the Empreffe, they are now made bulwarkes against the lawfull power of a King; he had therefore endeavoured to get them down, and gotten some of them into his power. The King himselfe is now summoned to answer this before a Legatine councell, wherein his brother is President: that was a bold adventure in them, but it was extreame rashnesse in him to appeare and plead the cause of the Crown of *England* before a Conventicle of his own subjects: And thus to secure *Rome* of supremacy in appeales, he suffers a recovery thereof against his own person in a court of Record; and so loses himselfe to save the Crown. Thus are Synods mounted up on Eagles wings; they have the King under them, they will next have the Crown. Within a while *Steven* is taken prisoner: the Empreffe perceiving the power of the Clergy, betakes her case to them now assembled in Synod; they now proud of the occasion (and conceiting that both Law and Gospell were now under their decree) publish that the election of the King belongeth

belongeth unto them, and by them the Empreſſe is elected Queen in open Synod, *Stevens* brother leading the game; and had ſhe been as willing to have admitted of the Laws as *Steven* was, ſhe had ſo continued, and had left a ſtrange preſident in the Engliſh government for poſterity. But the Citizens of *London*, who had made the way to the Throne for *Steven*, reduced the Synod to ſober conſideration, and helped the kings return unto his Throne again, wherein he continued a friend to the Clergy during the reſt of his time.

Henry the ſecond ſucceeded him; as brave a man as he, but beyond him in title and power, and one that came to the Crown without preingagement by promiſe or Covenant, ſaying that which was proper for a King. A man he was that knew full well the intereſts in the government, the growing power of the Clergy, and the advantages loſt from the Crown by his predeceſſor: and to regain theſe he ſmooths his way towards theſe braving men; ſpeaks faire, proffers faire; he would act to increaſe the bounds of the Church: he would have the Popes leave to doe him a kindneſſe, and ſobeit he might gaine an intereſt in *Ireland*, he would take it from the Pope; who pretended, as heire of *Jelus Chriſt*, to have the Iſlands and utmoſt parts of the earth for his poſſeſſion; and, as if he meant to be as good to the Church as *Steven* was, and much better, he deſires the Popes kindnes for the confirmation of the liberties and cuſtoms of his Crown and kingdom; and no ſooner deſired then obtained. This was the 2^d example of a King of *England*, but the firſt of an Engliſh king that fought to *Rome* for right in the Crown; and thereby taught the Pope to demand it as a privilege belonging to the Tripple crown. Nor was *Henry* the ſecond leſſe benigne to the Church-men, till he found by his deere bought experience that he had nourished Scorpions; and would have ſuppreſſed them, but was rather ſuppreſſed himſelfe; as in that ſhamefull ſucceſſe of the death of *Becket* may appeare, wherein he yeilded the day up to the Clergy, who formerly ſcorned to ſtoop to the greateſt Potentate on Earth. The ſtate of Kings is to be pitied, who muſt maintaine a politique affection above, and ſometimes againſt nature it

M. Paris.
An. 1155.

. 1. 155

Constit. at
Clarindon.

selfe, if they will escape the note of tyranny in their undertakings, and of a feeble spirit in their sufferings: For the King having made *Becket* Chancellor of England, & then Archbishop of *Canterbury*, he became so great that his fethers brushed against the Kings Crown, who begins to rouse up himselfe to maintaine his hono^r and prerogative Royall. The Bishops side with *Becket*: the King intending the person, and not the Calling, singles out the Archbishop, and hunts him to soile at *Rome*; yet before he went the King puts the points of his quarrell in writing, and made both Archbishop and Bishops signe them as the rights of his Crown, and as the *Consuetudines Anglie*: but *Becket* repenting went to *Rome* and obtained the Popes pardon and blessing, the rest of the Bishops yeelding the cause.

The particulars in debate were set down in the nature of Laws or Constitutions, commonly called the *Constitutions at Clarindon*, which shew the prevailing humour that then overspread the body of the Clergy in those daies, and therefore I shall summe them up as follows:

cap. 1.

Rights of Advousons shall be determined in the Kings Court.

This had been quarrelled from the first Normans time, but could never be recovered by the Clergy. Before the Norman time the County courts had them, and there they were determined before the Bishop and Sheriffe; but the Ecclesiasticall causes being reduced to Ecclesiasticall Courts, and the Sheriffe & the Laity sequestred from intermedling: the Normans according to the custome in their own Country, reduced also the triall of rights of Advousons unto the Supream courts, partly because the Kings title was much concerned therein, and the Norman Lords no lesse; but principally in regard that Rights require the consideration of such as are the most learned in the Lawes.

cap. 2.

Rights of Tythes of a Lay fee, or where the tenure is in question belong to the Kings court.

Pleas

Pleas of debts by troth-plight belong to the Kings cap. 3.
Court.

These were Saxon Laws, and do intimate that it was the endeavour of the Clergy to get the sole cognisance of Tythes, because they were originally their dues; and of the debts by troth-plight, because that oaths seemed to relate much to Religion, whereof they held themselves the onely professors.

The Kings Justice shall reforme errorrs of Ecclesiasticall Courts and Crimes of Ecclesiasticall person, cap. 4.

Appeales shall be from Archdeacons Courts to the Bishopps Courts and thence to the Archbishops courts, and thence to the Kings court, and there the sentence to be small. cap. 5.

No man that ever was acquainted with antiquity will question that these were received Laws in the Saxons time; nor did the Clergy ever quarrell them till the Normans taught them by curtelie done to Rome to expect more from Kings then for the present they would grant, whereof see Cap. 47. But King Steven that was indebted to the Clergy for his Crowne, and could not otherwise content them, parted with this Jewel of supream power in causes Ecclesiasticall to the Roman cognisance, as hath been already noted; but Henry the second would none of this cheate at so easie a rate. This strooke so smart a blow, as though the Popedom had but newly recovered out of a paralytique Schisme, yet seeing it so mainly concerned the maintenance of the tripple Crowne) Alexander the Pope having lately been blooded against a brave Emperour, made the lesse difficulty to stickle with a valiant King; who in conclusion was fain to yeeld up the bucklers, and let the Pope hold what he had gotten, notwithstanding against this law, and all former Law and custome. And thus the Popes supremacy in spirituall causes is secured both by a recovery and judgement by confession thereupon.

Constit. at Clarindon.

Constit. at Clarindon.

The King shall have waucions of Churches, and power cap. 6.

to elect by his secret Councell; The party elected shall doe homage salvo ordine, and then shall be consecrated.

This certainly was none of the best, yet it was a custome not altogether against reason, although not suitable to opinion of many; yet we meet two alterations of the ancient custome. First, that the election shall be by the King and secret Councell; whereas formerly the election of Bishops and Archbishops was of such publique concernment, as the Parliament tooke cognisance thereof, and (that which was worse) a Councell was hereby allowed, called a secret Councell; which in effect is a Councell to serve the Kings private aimes; and unto this Councell power given in the ordering of the publique affaires without advice of the publique Councell of Lords, which was the onely Councell of state in former times, and thus the publique affaires are made to correspond with the Kings private interest, which hath been the cause of much irregularity in the government of this Island ever since. The second alteration resteth in the *salvo*, which is a clause never formerly allowed; unlesse by practise in *Stevens* time, when as there was little regard of the one or the other: Nor doth it concur with the file of story that it should be inserted within these constitutions, seeing that writers agree it was the chiefe cause of quarrell between him and *Becket*, who refused submission without the clause, and at which the King strooke with the Archbishop for the space of seven yeeves, which was fix yeeves after the Constitutions were consented unto, and concluded upon.

Const it. at
Clarindon.

cap. 7.

No Clergy man or other may depart the Realm without the Kings licence.

Its a law of Nations, and must be agreed on all hands, that no reason of state can allow dispensations therein, especially in a doubtfull government, where the Supremacy is in dispute: and this the wilfull Archbishop never questioned till he questioned all authority, but in order to his own; for but the yeeve before, when he went to *Turron* to the general Councell upon

upon summons, he first obtained licence from the King before he went. M. Paris.

No sentence of excommunication or interdiction to passe against the Kings tenant or any minister of state, without licence first had of the King, or his chiefe Justice in the Kings absence. cap. 8.

Till the Conquest no Excommunication passed without warrant of Law made by the joynt assembly of the Laity and Clergy; but the Conquerour having let loose the Canons, and the Clergy having gotten the upper hand in Councils, made Canons as they pleased, and so the Laity are exposed to the voluntary power of the Canon: onely as well the Normans, as untill these times Kings have saved their owne associates from that sudden blow, and upon reason of religious observance least the King should converse with excommunicate persons ere habe aware. Constit. at Clarindon. vid. cap.

The Laity are not to be proceeded against in Ecclesiasticall Courts, but upon prooffe by witnesses in the presence of the Bishop: and where no witnesses are, the Sheriffe shall try the matter by Jury in the presence of the Bishop. cap. 9.

A negative law; that implieth another course was used upon light fame or suspicion *ex officio*, although the oath at that time was not borne into the world, and that all this was contrary to the liberty of the Subject, and law of the Land: and it intimates a ground of prohibition in all such cases upon the common law, which also was the ancient course in the Saxons times, as hath been formerly noted.

Excommunicated persons shall be compelled onely to give pledge and not Oath or baile to stand to the judgement of the Church. cap. 10.

Upon the taking and imprisoning of the party excommunicate; the course anciently was it seemeth to give pledge to stand to order: of this the Bishops were weary (sohn as it seemeth

meth; and therefore waved it, and betooke themselves to other inventions of their own, viz. to bind them by oath or baile; both which were contrary to law: for no oath was to be administered but by law of the kingdome; nor did it belong to the Ecclesiasticall laws to order oathes or baile, and therefore this law became a ground of prohibition in such cases, and of the Writ *de cantione admittenda*.

cap. 11.

Persons cited, and making default, may be interdicted, and the Kings Officer shall compell him to obey.

If the Kings Officer make default, he shall be amerced, and then the party interdicted may be excommunicated.

So as the proceſſe in the Spirituall Courts was to be regulated according to Law: nor did it lie in the power of such Courts to order their own way, or to ſcatter the cenſure of excommunication according to their own liking. This together with all thoſe that foregoe, the Archbiſhop upon his repentance abſolutely withſtood, all though he had twice conſented and once ſubſcribed to them, having alſo received ſome kind of allowance thereof even from Rome it ſelfe.

Conſtit. at
Clarindon.

cap. 12.

Clergy men belding per Baroniam ſhall doe ſuch ſervices as to their tenure belong, and ſhall aſſiſt in the Kings Court till judgement of life or member,

Two things are hereby manifeſt: Firſt, that notwithstanding the Conquerours law formerly mentioned, Biſhops ſtill ſate as Judges in the Kings courts, as they had done in the Saxon times; but it was upon cauſes that meerly concerned the Laity; ſo as the Law of the Conquerour extended onely to ſeparate the Laity out of the Spirituall Courts, and not the Clergy out of the Lay courts. Secondly, that the Clergy eſpecially thoſe of the greater ſort queſtioned their ſervices due by tenure, as if they intended neither Lord nor King, but the Pope onely. Doubtleſſe the uſe of tenures in thoſe times was of infinite conſequence to the peace of the kingdome, and government of theſe Kings, when as by theſe principally not onely all degrees were untied and made dependant from the

Lord

Lord paramount to the Tenant peravale ; but especially the Clergy with the Laity upon the Crown , without which a strange metamorphosis in government must needs have ensued, beyond the shape of any reasonable conceit, the one halfe almost of the people in England being absolutely put under the dominion of a forraigne power.

Sanctuary shall not protect forfeited goods, nor Clerks convicted or confessed. cap. 13, 14.

This was Law, but violence did both now and afterwards much obliterate it.

Churches holden of the King shall not be aliened without Licence.

Constit. at
Clarindon.
cap. 15.

It was an ancient Law of the Saxons, that no Tenements holden by service could be aliened without licence or consent of the Lord, because of the Allegiance between Lord and Tenant: Now there was no question but that Churches might lie in Tenure as well as other Tenements; but the strife was by the Churchmen, to hold their Tenements free from all humane service, which the King withstood.

Sons of the Laity shall not be admitted into Monastery without the Lords consent. cap. 15.

Upon the same ground with the former : for the Lord had not only right in his tenant, which could not be aliened without his consent, but also a right in his tenants children ; in regard they in time might by descent become his tenants, & so lie under the same ground of law : for although this be no alienation by legall purchase, yet it is in nature of the same relation ; for he that is in a Monastery is dead to all worldly affaires.

These then are the rights that the King claimed, and the Clergy disclaimed at the first ; although upon more sober consideration they generally consented unto the five last : but their Captaine Archbishop Becket withstood the rest, which cost him his life in the conclusion, with this honourable testimony, that his death *Samsen* like effected more then his life ; for the maine thing of all the rest the Pope gained to be friends, for the

the losse of so great a tickler in the Church affaires, as *Becket* was.

In this Tragedy the Pope observing how the English Bishops had forsaken their Archbishop, espied a mule through which all the game of the Popedom might soon escape, and the Pope be left to sit upon thornes in regard of his authority here in *England*. For let the Metropolitane of all *England* be a sworne servant to the Metropolitane of the Christian world, and the rest of the English Bishops not concur, it will make the tripple Crown at the best but double. *Alexander* the Pope therefore meained not to trust their faire natures any longer; but puts an oath upon every English Bishop, to take before their consecration, whereby he became bound

Antiq. Brit.
302.
F. xc. An.
1179.

1. To absolute allegiance to the Pope and Romish Church.
2. Not to further by deed or consent any prejudice to them.
3. To conceale their counsels.
4. To ayd the Roman papacy against all persons.
5. To assist the Roman Legate.
6. To come to Synods upon Summons.
7. To visit *Rome* once every three yeeres.
8. Not to sell any part of their Bishoprick without consent of the Pope.

And thus the English Bishops that formerly did but regard *Rome*, now give their estates, bodies, and soules unto her service; that which remaines the King of *England* may keepe: And well it was that it was not worse, considering that the King had vowed perpetuall enmity against the Pope; but he wisely perceiving that the Kings spirit would up againe, having thus gotten the maine battell, durst not adventure upon the Kings reare, least he might turn head; and so he let the King come off with the losse of appeales, and an order to annull the customes that by him were brought in, against the Church, which in truth were none.

M. Paris
An. 1167.

Baronius Anal.
1164. Sec. II.

This was too much for so brave a King as *Henry* the second, to loose to the scarcrow power of *Rome*: yet it befell him as many great spirits that favour prevailes more with them then feare or power: for being towards his last times worne with
griefe

griefe at his unnaturall sonnes; a shaddow of the kindnesse of the Popes Legate unto him wonne that which the Clergy could never formerly wrest from him in these particulars granted by him: That

M. Paris
An. 1176.

No Clerke shall answer in the Lay courts, but onely for the forest, and their Lay fee.

1.

This favoured more of curtesie then justice, and therefore we finde not that the same did thrive, nor did continue long in force as a Law, although the claime thereof lasted.

Vacances shall not be holden in the Kings hand above one yeare, unlesse upon case of necessity.

2.

This seemeth to passe somewhat from the Crown, but lost it nothing; for if the Clergy accepted of this grant, they thereby allow the Crown a right to make it, and a liberty to determine its own right, or continuing the same by being sole judge of the necessity.

Killers of Clerks convicted shall be punished in the Bishops presence by the Kings Justice.

3.

In the licentious times of King Steven, wherein the Clergy played Rex, they grew so unruly that in a short time they had committed above a hundred murders. To prevent this evill the King loth to enter the List with the Clergy about too many matters, let loose the law of feude for the friends of the party slaine to take revenge; and this cost the blood of many Clerkes: the Laity happily, being more industrious therein then otherwise they would have been, because the Ecclesiasticall Judge for the most part favoured them. As an expedient to all which this Law was made, and so the Clergy was still left to their Clergy, and justice done upon such as sought their blood.

Clergy men shall not be holden to triall by battaile.

4.

It was an ancient Law of the Saxons, and either by neglect worne out of use, or by the valour of the Clergy laid aside,

as resolving rather to adventure their own blood, then to end their quarrell before the Lay Judge by plea; but grown weary of that course, and likely also put hard to the pinch upon complaints made by them against Clerkslayers, they are faine to have recourse to their ancient priviledge.

Hitherto therefore its manifest the Clergy were in their growing condition, notwithstanding the policy and power of *Henry* the second, who was the paragon of that age.

After him reigned *Richard* the first, that must expiate his disobedience to his father by obedience to his ghostly father the Pope in undertaking the holy warre; and being gone, left the government in his absence so deeply intrusted to the Clergy, as they could loose nothing of what they had gained, unless they would; and might have gained much more then they did or should; had not the Bishop that was the overseer of the whole Kingdom being drunken with vanity, and spued out his own shame. However the successe was, it was not contrary to the principles of those times: for *Richard* had experience in the Emperor *Frederick* and his fathers example, that the Pope & Clergy were too hard for all the Potentates in *Europe*, and therefore might most safely trust them with all he had at home, whiles he was in their service abroad. Nor were they short of what was intrusted to them, but stood close for the maintenance of his right to the Crown, and emptied themselves even to the very consecrated Vessels, and procured the Laity of all sorts to doe the like, to save the Kingdome from the rape of strangers and usurpers, who esteemed the King dead in Law, and as one buried alive.

Thus passed they to King *John* the government, supposing themselves well enough assured of what they had gotten by their severall achievements had under the reignes of three severall Kings successively: and King *John* might well enough have understood the times if he had seriously considered them; but being heighthned all his life time with lawlesse government, wherein he was trained up in *Ireland*; he knew not how to stoop till he stooped so low as the Legates knee, and his Crown at the Popes foot; leaving an example to posterity to beware of striving with the Clergy.

If then these sparks of ambition were so virulent being alone, certainly in their joynt consultations much more. They had long striven now since the conquest to have excluded the Laity from their Synods, and about these daies effected it; and yet about Henry the seconds time it may be supposed the thing either was not yet done, or so lately that the Law was not cleare in that point; for *Petrus Bleensis*, who was Archdeacon of Bath about those times, in his Epistle to the Archbishop of Yorke concerning the restraint of the growing sect of the Publicans, he adviseth in these words, *Accipite clerum, congregare populum, & ex eorum communi deliberatione, qui spiritum Domini habent, terribilis constitutio promulgetur, &c.* and if the Historian doth not mistake; the proceedings against that sect being onely for errors in Religion, was in a Councell of Bishops and Lords. Neverthelesse, whether present or absent the Laity sat there as cyphers, making the number great, but not valuab^{le} by themselves. For even in the Norman times they were brought so low as the constitution made by the Clergy wrought more upon them then civility it selfe can work upon professors of Religion in these daies. For it seems excesse of long haire was grown to that measure that the Synod cried out against it, and decreed that men should cut their haire so as their eyes and laps of their eares might be seen; and the King himselfe, I mean Henry the first submitted to this cut, and made all his Knights to doe the like, and exposed themselves to the then odious by-names of clowns or Priests (like to the round heads of these daies) who formerly marched under the titles of *criniti* or *Ruffians*. This did but touch the haire, but they went to the quicke when they decreed that Lords should not sell their villains, and that outlaws should passe in certain particular cases, as in the constitutions of Archbishop *Anselme* may appeare. Afterwards in these Kings times they flew at the throat of the government, got all places of honour, or profit, or power, whether for peace or warre under their gripe; deposited and advanced as they pleased, even to the Royall Thron it selfe; and that not onely out of a hidden passion of State, but advisedly concluded it for a maxime, that the election of the

M. West.
An. 1127.

Antiq. Brit.
150. ibid. 155.

Ibid. 127.

King belonged to them as in the case of the election of *Maud* the Emperesse they did hold forth to all the world; and in which the King also then flattered them, as holding their election so necessary that he kept the whole Synod in duresse to have their votes for the election of his sonne to be his successor.

CHAP. LX.

Of the English Commonalty since the Normans time.

THe dignity of the English Crown thus deflowred by the great men was no losse to the common people: for as in all decays of Monarchy the great men get nothing if they please not the people, so the King can hold nothing if they be not contented: And yet contented or not contented, they could not gain much; for as affaires then stood in the Christian world the Politicians discourse of three kinds of government proved idle; neither could Monarchy, Aristocracy, nor Democracy, attaine any semblable condition in any place so long as the Church held its designe apart, & prevailed to have the greatest share in all, not now by the favour either of great or small, but by a pretended divine right, through which they now had gotten to their full pitch of Lordship in the consciences of men. It must be acknowledged that this was a distemper in government; yet such it was as kept humours low and restrained the inordinate excesses that in all kinds of government are subject to break forth; so as neither King, nor Lords, nor people could swell into larger proportion then would suit with the ends of the Churchmen. But to mind the matter in hand: somewhat the Commons gained in these stormy times: The taxes that they were charged with were rather perswaded then imposed upon them; and generally they were sparing in that worke; and its noted for the honour of King *Steven*, that though he was seldome without warre, yet he not onely never charged

charged the people with any tax, but released that of Dane-
guelt and acquitted the subject for ever of that tax, which
former Kings challenged as their right; all which shew him
to be a brave King if he was not a very rich man. *Henry* the
second was more heavy because he had more to doe: yet finde
we but one assessment which was escuage (unlesse for the holy
warre) which was more the Clergymens then his. *Richard*
was yet a greater burden: his reigne was troublesome to him,
and he deserved it; for from the beginning thereof to the end-
ing could never the guilt of his disobedience to his father be
blotted out; but it was more troublesome to the people be-
cause it cost so much treasure, was mannaged by such ill go-
vernours (except the Archbishop of *Canterbury*) and was un-
succesfull in most of his undertakings: yet never invaded the
liberties of the Commons by any face of prerogative. But
what wanted in him was made compleat and running over in
his successor *John*, who (to speake in the most moderate sence
of his government) being given over to himselfe when he
was not himselfe, robbed the Lords of their authority, berea-
ved the Church of its rights, trode under foot the liberties of
the people, wasted his own Prerogative; and having brought
all things into dispaire, comes a desperate cure; the head
is cut off to save the body, and a president left for them
that list to take it up in future ages. And thus that which
Steven gave, *Henry* the second lost, *Richard* the first would not
regaine, and *John* could not; and so all were gainers but the
Crown.

CHAP. LXI.

Of Judicature, the Courts, and their Judges.

IT is no silent argument that the Commons gaine; where
Laws grow into course; and it was the lot of these trouble-
some.

some times to lay a foundation of a constant government, such as all men might learne; which formerly was laid up only in the breasts of wise experienced men. The two most considerable points in government is the law, and the execution; the latter being the life of the former, and that of the Common-weale. I say not that the law was augmented in the body of it, or that the execution had a freer course then in the best of the former times; but both were more and more cleared to the world in many particulars, as well touching matters concerning practice of the Law, as touching rules of righteousness: for the first whereof we are beholding to *Glanville* in *Henry* the second time; and for the latter to King *John*, or rather the Barons in his time in the publishing of the grand Charter, or an enumeration of the liberties or customes of the people derived from the Saxons; revived, continued, and confirmed by the Normans and their successors; which for the present I shall leave in *lance dubio* to stand or fall, till occasion shall be of clearing the point, in regard that King *John* soon repented of his oath (the bond of his consent) and to heale the wound, got the Popes pardon and blessing thereupon: so easie a thing it was for a sonne of the Roman Church to passe for a good catholique in an unrighteous way.

The execution of the Law was done in severall Courts according to the severall kinds of affaires, whereof some concerned matters of crime & penalty; and this touched the Kings honour, and safety of the persons of himselfe and his subjects; and therefore are said to be *contra coronam & dignitatem, &c.* The second sort concerne the profits of the Crown, or treasure of the Kingdome. The third concerne the safety of the estates of the people. These three works were appointed unto three severall Courts, who had their severall Judges especially appointed to that worke. Originally they were in one, *viz.* in the supream Court of Judicature, the court of Lords, whereof formerly was spoken; but after through increase of affairs by them deputed or committed to the care of severall men that were men of skil in such affaires, and yet retained the Supremacy in all such causes still. And because that which concerned the publique trea-
sure

sure was of more publique regard then the other, the deputation thereof was committed probably to some of their own members, Glof. who in those daies were Barons of the Realm, and afterwards retained the title, but not the degree; and therefore were called for distinction sake Barons of the Exchequer. The particular times of these deputations appeare not clearly out of any monument of antiquity; nevertheless its cleare to me that it was before Henry the seconds time, as well because Henry the first had his *Judex fiscalis*, as *Glanvile* so frequently toucheth upon the Kings court of pleas, which cannot be intended at the court of Lords, for that in those daies was never summoned but in time of Parliament, or some other speciall occasion: but more principally because the Historian speaking of the Judges *itinerant*, reciteth some to be of the common pleas; which sheweth that there was in those daies a distinction of jurisdiction in Judicatures. And it may very well be conceived that this distinction of Judicature was by advise of the Parliament after that the grand councill of Lords was laid aside by Kings, and a Privy councill taken up, unto whom could not regularly belong any juridicall power, because that remained originally in the grand assembly of the Lords.

LI. Hen. I. c. 24.

Hoveden.

Over these Courts, or two of them one man had the prime title of chiefe Justice, who then was called Lord chiefe Justice of *England*, and whose Office was much of the nature of the Kings Lieutenant in all causes and places, as well in warre as peace; and sometimes was appointed to one part of the Kingdome, and by reason thereof had the name onely of that part, and some other of the other parts. The greatnesse of this office was such as the man for necessity of state was continually resident at the Court, and by this means the Kings court was much attended by all sorts of persons, which proved in after times as grievous to the King as it was burdensome to the people. Other Judges there were which were chosen for their learning and experience, most of them being of the Clergy, as were also the under Officers of those courts; for those times were *Romies* houre and the power of darknesse.

Other Courts also were in the countrey, and were Vicontiel

or

Hoveden.

or Cours of Sheriffs and Lords of Hundreds and corporations, and Lordships, as formerly; and these were settled in some place; but others there were which were *itinerant*, over which certaine Judges presided, which were elected by the grand councell of Lords, and sent by commission from King *Henry* the second throughout the Kingdome, then devided into six circuits, unto each of which was assigned three Justices; so as the whole number of Justices then was eighteen. The Office was before the coming of the Saxons over hither, but the assignation was new; as also was their oath, for they were sworne. But the number continued not long, for within foure yeeres the King redivided the land into foure circuits, and unto each circuit assigned five Justices, making in the whole the number of twenty and one Justices; for the Northern circuit had six Justices which the King made Justices of the Common pleas throughout the Kingdome. Neither yet did the first commission continue so long as foure yeeres; for within that time *Richard Lucy* one of the Justices had renounced his Office and betaken himselfe to a cloister, and yet was neither named in the first commission nor in the latter; nor did the last commission continue five yeeres; for within that time *Ralph Glanville* removed from the Northerne circuit to that of *Worcester*, as by the story of *Sir Gilbert Plumpton* may appeare; though little to the honour of the justice of the Kingdome, or of that Judge however his book commended him to posterity. I take it upon the credit of the reporter, that this Itinerary judicature was settled to hold every seven yeeres; but I finde no monument thereof before these daies.

Hoveden. 337.
Ibid. 445.Hoved. An.
1184.

Co. jurisd. c. 33

Hoveden.
Glanvil. l. 14.
c. 7.

As touching their power, certainly it was in point of judicature as large as that of the court of Lords, though not so high: it was as large because they had cognifance of all causes both concerning the Crown and common pleas; and amongst those of the Crown this onely I shall note that all manner of falshood was inquirable by those Judges which after-came to be much invaded by the Clergy.

I shall say no more of this, but that in their originall these Iters were little other then visitations of the Countrey by the grand

grand Councell of Lords. Nor shall I adde any thing concerning the Vicontiel courts and other inferiour but what I finde in *Glanvile*: that though robbery belonged to the Kings court, yet thefts belonged to the Sheriffs Court; and (if the Lords court intercepts not) all batteries and woundings, unlesse in the complaint they be charged to be done *contra pacem Domini Regis*: the like also of inferiour trespasses, besides common pleas, whereof more shall follow in the next Chapter as occasion shall be.

Glanv. lib. 2. cap. 2.

Idem lib. 2. & 10.

CHAP. LXII.

Of certaine Laws of Judicature in the time of Henry the second.

ANd hereof I shall note onely a few as well touching matters of the Crown as of property being desirous to observe the changes of Law with the times, and the manner of the growth thereof to that pitch which in these times it hath attained.

We cannot finde in any story that the Saxon Church was infested with any Heresie from their first entrance till this present generation. The first and last Heresie that ever troubled this Island was inbred by *Pelagius*; but that was amongst the Britons, and was first battered by the Councell or Synod under *Germanus*; but afterwards suppressed by the zeale of the Saxons who liked nothing of the Brittish breed, and for whose sake it suffered more happily then for the foulness of the opinion. The Saxon church leavened from *Rome* for the space of above five hundred yeeres held on its course without any intermission by crosse doctrine springing up, till the time of Henry the second. Then entred a sect whom they called Publicans; but were the Albigeneses, as may appeare by the decree of Pope *Alexander*, whose opinions I shall not trouble my course with, but it seems they were such as crossed their way, and Henry the second made the first president of punishing Heresie in this

1.
Heresie.

Hoved, 585.

Dd

King-

Nabrig. l. 2.
cap. 13. d. v. n. d.

Decret Papæ
Alexand^{ri}
Hoveden. 48. 2.

Kingdome under the name of this Sect, whom he caused to be brought before a councell of Bishops, who endeaoured to convince them of their error; but failing therein, they pronounced them Hereticks, and delivered them over to the Lay power; by which means they were branded in the forehead, whipped, and exposed to extremity of the cold (according to the decree of the Church) died. This was the manner and punishment of Hereticks in this Kingdome in those daies; albeit it seemeth they were then decreed to be burnt in other countries, if that relation of Cogshall be true which Picardus noteth upon the 13 chapter of the History of William of Newberry, out of which I have inserted this relation.

2.
Apostacy.
Bracton, lib. 3.
cap. 9.

Another case we meet with in Henry the seconds time concerning Apostacy, which was a crime that as it seems died as soon as it was born; for besides that one we finde no second thereto in all the file of English story. The particlular was, that a Clerke had renounced his baptisme, and turned Jew; and for this was convicted by a councell of Bishops at Oxford, and was burned. So as we have Apostacy punished with death, and Heresie with a punishment that proved mortall; and the manner of conviction of both by a councell of the Clergy, and delivered over to the Lay power, who certainly proceeded according to the direction of the Canon, or advice of the councell. These (if no more) were sufficient to demonstrate the growing power of the Clergy, however brave the King was against all his enemies in the field.

3.
Treason:

Lib. 2. cap. 2.

Treason was anciently used onely as a crime of breach of trust or fealty, as hath been already noted; now it grows into a sadder temper, and is made all one with that of *lese Majesty*; and that Majesty that now a daies is wrapped up wholly in the person of the King, was in Henry the seconds time imparted to the King and Kingdome, as in the first times it was more related to the Kingdome. And therefore Glanville in his booke of laws, speaking of the wound of Majesty, exemplifies sedition and destruction of the Kingdome to be in equal degree a wound

wound of Majesty, with the destruction of the person of the King: and then he nameth Sedition in the Army, and fraudulent conversion of Treasure & convey which properly belongs to the King, All which he saith are punished with death and forfeiture of estate, and corruption of blood; for so I take the meaning of the words in relation to what ensueth.

Felonies, of Manslaughter, Burning, Robbery, Ravishment, and Faulconry are to be punished with losse of member and estate.

This was the law derived from the Normans, and accordingly was the direction in the charge given to the Justices *in Henry the seconds time*, as appeareth in *Hoveden*. But treason or treachery against the path, fealty, or bond of allegiance, as of the servants against the Lord was punished with certaine and with painfull deaths: and therefore though the murder of the King was treason, yet the murder of his sonne was no other then as of another man, unless it arose from those of his own servants. The penalty of losse of estate was common both to Treason and Felony, it reached even unto Thefts, in which case the forfeiture, as to the moveables, was to the Sheriffe of the County, unto whose cognisance the case did belong; and the land went to the Lord immediately, and not to the King. But in all cases of Felony, & of the higher nature, the party (though not the Kings tenant) lost his personal estate to the King for ever, his free holds also for a yeere and a day, after which they returned to the Lord of the soile by way of escheat. It seemeth also that the losse not onely of chattels and goods but also of lands, &c. extended to Outlaries (I conceive in case of Felony) and the Kings pardon in such case could not bind the Lords right of escheate; although it might discharge the goods, and the yeere and the day wherunto the King was entituled; which case alone sufficiently declareth what power Kings had in the estates of their subjects.

Manslaughter made not bailable.

This was law in Henry the seconds time, although it crossed

4.
Felonies.

Ll. Hen. 1. c. 25.

Ll. Hen. 1. c. 79

Glanv. lib. 7.
cap. 17.

5.
Manslaughter.

Glanvil. l. 14.
cap. 1 & 3.

the Norman Law; and questionlesse it was upon good ground: for the times now were not as those in the Conquerours times, when shedding of blood was accounted valour; and in most cases in order to the publique service. And now it seems it was a growing evill, and that cried so loud, as though in case of Treason baile might be allowed, yet not in this case *ubi ad terrorem aliter statutu[m] est*, saith the authour.

6.
Robbery.

Ll. Gul. 4.
Spicil. 174.

Glanvil. lib. 14.
cap. 1.

Robbers shall be committed to the Sheriffe, or in his absence to the next Castelane, who shall deliver him to the Sheriffe. And the Justices shall doe right to them, and unto trespassers upon Land.

By the Conquerours law these offenders wereailable, and I conceive this was no repeale thereof; and the rather because *Glanvile* alloweth of pledges in all cases (except Manslaughter) yea in those crimes that did wound Majesty it selfe, although they concerne the destruction of the Kings person, or sedition in the Kingdome or Army thereof. The Justices herein mentioned were intended to be the Justices *itinerant*: and the trespasses upon Land are meant such as are *contra pacem Domini Regis*, as riotous and forcible entries; for some trespasses were against the peace of the Sheriffe, as formerly hath been observed.

7.
Fauxonry.
Glanvil. lib. 14
cap. 7.

Fauxonry is of severall degrees or kinds: some against the King, others against other men; and of those against the King some are punished as wounds of Majesty, as falsifying the Kings charter: and whether falsifying of money were in that condition or not I leave, or falsifying of measures, yet more inferiour I cannot determine; but its cleare by *Glanvile* that falsifying of the deed of a private person was of smaller consideration, and at the utmost deserved but losse of member.

8.
Glanvil. lib. 7.
cap. 1.
Ibid. c. 5.

Inheritances may not be aliened.
Inheritances were in those times of lands or goods; for it was the custome then that the personall estate (the debts deducted) was divisible into three parts; one whereof belonged

ged in right to the wife as her reasonable part, the other to the heire, and third to the testator to make his will of them; and of the other two parts he could not dispose by will. Concerning Lands, it was regularly true that no man could alien his whole inheritance to the disherit of his heire, either by act in his life time, or any part thereof by his last will, without the concurrence of the heire. But of purchased lands he may give part by act executed in his life time, though he have no Lands by inheritance; and if he hath no issue, then he may alien all. And where a man hath Lands by inheritance, and also by purchase, he may alien all his purchased lands as he pleaseth. If the lands be holden in Gavel kinde, no more of the inheritance can be conveyed to any of the children, then their proportionable parts will amount unto. This law of inheritance was divers according to the tenure, for the lands in Knight-service alwaies descended to the heire; but such as were holden in soccage passed according to the custome, either to the eldest or to the youngest, or to all equally. And thus stood the generall state of inheritance from the Normans times hitherto, seeming somewhat too strait for the free men that by law of property might challenge a power to doe with their own as they pleased. But the Normans saw a double prejudice herein; the first was the danger of ruine of many of their families who now ingrafted into the English stocke; and yet not fully one might expect a late checke to their preferments from the Saxon parents after a long and faire semblance made of their good will. The second prejudice was the decay of their Militia, which was maintained by riches more then by multitude of men, partly because that rich men are most fearful of offending, and therefore ordinarily are most serviceable both with their bodies and estates against publique dangers; and partly because by their friends and allies they bring more ayd unto the publique, by ingaging them in the common cause, that otherwise might prove unsensible, of the condition of their Country.

Ll. Hen 1. c. 88.

The heire of a free man shall by descent be in such seisin as
his

Vide Glanv.
 l. 7. c. 9.

his ancestor had at the time of his death, doing service and paying releif; and shall have his chattails.

If the heire be under age the Lord shall have the Wardship for the due time, and the wife her Dower, and part of the goods

If the Lord withhold seisin the Kings Justice shall trie the matter by twelve men.

The first of these branches is declaratory of a ground of common law; but being applied to the last is an introduction of a new law of triall of the heires right by Assize of Mortdancester, where formerly no remedy was left to the heire, but a Writ of right. If these three branches be particularly observed, they speake of three sorts of heires, of tenants by Knight-service, viz. such as are majors, or of full age; and such as are minors, or under age; and such as are of a doubtfull age. Those that are of full age at the death of their ancestors may possesse the lands descended, and the Lord may not dispossesse him thereof; but may be resisted by the heire in the maintenance of his possession, so as he be ready to pay reliefe, and doe service that is due; and if the Lord expell him he shall have remedy by Assize. Those heires that are minors shall be under the Lords guardianship till they come to one and twenty yeeres. The heires of such as hold by soccage are said to be of full age at fiftene yeeres, because at that age they were thought able to doe that service: but the sonnes of Burgessees are then said to be of full age when they have ability to mannage their fathers calling, such as telling of money, measuring of cloath, and the like: yet doth not *Glanvile* or any other say that these were their full age to all purposes; albeit that some Burroughs at this day hold the last in custome to all intents whatsoever. The last branch provideth the remedy to recover to the heire his possession in case it be detained, either through doubtfulness of age of the heire, or his title; and it directs the issue to be tried by twelve men. This triall some have thought to be of *Glanvils* invention; and it may well be that this triall of this matter as thus set down was directed by him; yet he useth often in his booke the word *foler*; and in his preface saith,

saith, that he will set down *frequentius usitata*, and its past question; but that the triall by twelve men was much more ancient, as hath been already noted. One thing more yet remaineth, concerning the widdow of the tenant, whose dower is not onely provided for, but her reasonable part of her husbands personall estate. The originall hereof was from the Normans, and it was as popular as that of Wardships was Regall; and so they made the English women as sure to them as they were sure of their children.

The Justices shall by Assize try disseisins done since the Kings comming over Sea next after the peace made between him and his sonne.

10.

This is called the Assize of Noyel disseisin, or of disseisins lately made. It seems that the limitation was set for the Justices sake, who now were appointed to that worke, which formerly belonged to the County courts; and to prevent intrenchments of Courts, a limitation was determined, although the copy seemeth to be mistaken, for the limitation in the writ is, from the Kings last voyage, or going into *Normandy*.

Glanv. lib. 13.
cap. 33.

Justices shall doe right upon the Kings writ for halfe a Knights fee, and under, unlesse in cases of difficulty, which are to be referred to the King.

11.

The Justices *itinerant* ended the smaller matters in their circuits, the other were reserved to the King in his bench.

Justices shall inquire of Escheates, Lands, Churches, and women, in the Kings gift; And of Castle guard, who? how much? and where?

12.

So as the Judges *itinerant* had the worke of Escheators; and made their circuits serve as well for the Kings profit as Justice to the subjects. They used also to take fealty of the people to the King at one certaine time of the yeere, and to demand homage also. These matters of the Kings Exchequer made the presence of the Judges lesse acceptable, and it may be occasioned some kind of oppression. And as touching Castleguard, it

was

was a tenure in great use in these bloody times, and yet it seemeth they used to take rent instead of the personall service; else had that enquiry (how much?) been improper.

13.

Of a tenants holding, and of severall Lords.

Glanv. lib. 9.
cap. 4.

Lit. lib. 2. cap. 5

That one man may hold severall lands of severall Lords, and so owe service to them all is so common, as nothing can be more: neverthelesse it will not be altogether out of the way to touch somewhat upon the nature of this mutuall relation between Lord and Tenant in generall, that the true nature of the diversity may more fully appeare. The foundation or subject of service was a piece of land, or other tenement at the first given by the Lord to the Tenant in affirmance of a stipulation between them presupposed, by the giving and receiving whereof the tenant undertooke to performe service to the Lord, and the Lord undertooke protection of the tenant in his right to that tenement. The service was first by promise solemnly bound, either by oath which the Lord or his deputy by the common law hath power to administer; as in the case of fealty, in which the tenant bound himselfe to be true to the honour and safety of his Lords person, and to perform the service due to the Lord for the tenement so given: or otherwise by the tenants humble acknowledgement, and promise not onely to performe the services due, but even to be devoted to the Lords service, to honour him, and to adventure limbe and life, and to be true and faithfull to the Lord. This is called Homage, from those words, *I become your man Sir*; and yet promiseth upon the matter no more but fealty in a deeper complement, albeit there be difference in the adjuncts belonging to each. For though it be true that by promise of being the Lords man, a generall service may seem to be implied, yet in regard that it is upon occasion onely of that present tenure, it seemeth to me that it is to be restrained onely to those particular services which belong to that tenement; and therefore if that tenement be holden in soccage, although the tenant be bound to homage, yet that homage ties not the tenant to the service of a Knight; nor contrarily doth the homage of

a tenant in Knight service tie him to that of socage upon the command of his Lord, though he professeth himselfe to be his man. Nor doth the tenants homage binde him against all men, nor *ad semper*; for in case he holdeth of two or divers Lords by homage for severall tenements, and these two Lords be in warre one against the other, the tenant must serve his chiefe Lord of whom the capitall house is holden; or that Lord which was his by priority, who may be called the chiefe Lord because having first received homage he received it absolutely from his tenant; but all other Lords receive homage of such tenant with a saving of the tenants faith made to other Lords and to the King, who in order to the publique had power to command a tenant into warre against his own Lord. If therefore he be commanded by the King in such cases unto warre he need not question the point of forfeiture; but if he be commanded by a chiefe of his other Lords into warre against a party in which another of his Lords is engaged, his safest way is to enter upon the worke, because of his allegiance to that Lord, yet with a *salvo* of his fealty to that other Lord. But in all ordinary cases tenants and Lords must have regard to their stipulation, for otherwise if either breake the other is discharged for ever; and if the fault be in the tenant, his tenement escheats to his Lord; and if the Lord faile, he loses his tenure, and the tenant might thence forth disclaime, and hold over for ever. Neverthelesse the Lords had two privileges by common custome belonging to their tenures, which although not mentioned in the stipulation, were yet more valuable then all the rest; the one concerning matter of profit, the other of power: That of profit consisted in ayds and reliefe. The ayds were of three kinds: one to make the Lords eldest sonne Knight, the other to marry his eldest daughter; the third to helpe him to pay a reliefe to his Lord Paramount; which in my opinion sounds as much as if the tenants were bound by their tenures to ayd their Lord in all cases of extraordinary charge (saving that the Lord could not distraine his tenant for ayd to his warre) and this according to the Lords discretion; for *Glanville* saith that the law determined nothing

Glanv. lib. 9.
 cap. 1.
 Lib. 7. cap. 10.

Glanvill lib. 9.
 cap. 1.

Ibid. cap. 4.

Ibid. c. 8.

Glanv. l. 9. c. 8.

Ibid.

Ibid.

Glanv. 7. 10.

Ibid. c. 12.

concerning the quantity or valew of these ayds. These were the Norman waies, and favoured so much of Lordship, that within that age they were regulated; But that of relieves was an ancient sacrifice, as of first fruits of the tenement to the Lord, in memoriall of the first Lords favour in conferring that tenement; and it was first settled in the Saxons time. The Lords priviledge of power extended so farre as to distraine his tenants into his own Court to answer to himselfe, in all causes that concerned his right; and so the Lord became both Judge and party, which was soon felt and prevented, as shall appeare hereafter. Another priviledge of the Lords power was over the tenants heire after the tenants death, in the disposing of the body during the minority and marriage of the same. As touching the disposing of the body, the Lord either retained the same in his own power, or committed the same to others; and this was done either *pleno jure*, or rendring an account. As concerning the marriage of the females that are heires, or so apparent: the parents in their life time cannot marry them without the Lords consent; nor may they marry themselves after their parents death without the same; and the Lords are bound to give their consent, unlesse they can shew cause to the contrary. The like also of the tenants widows that have any dowry in the lands of such tenure. And by such like means as these the power of the Barons grew to that height, that in the lump it was too massie both for Prince and Commons.

14.

Of the power of the last Will.

It is a received opinion, that at the common Law no man could devise his lands by his last will. If thereby it be conceived to be against common reason, I shall not touch that; but if against custome of the ancient times, I must suspend my concurrence therewith untill those ancient times be defined: for as yet I finde no testimony sufficient to assert that opinion; but rather that the times hitherto had a sacred opinion of the last will, as of the most serious, sincere, and advised declaration of the most inward desires of a man, which was the main thing

thing looked unto in all conveyances, *Voluntas donatoris de cetero observetur.* And therefore nothing was more ordinary then for Kings in these times as much as in them did lie to dispose of their Crowns by their last Will. Thus King *John* appointed *Henry* the third his successor, and *Richard* the first devised the Crown to King *John*; and *Henry* the first gave all his lands to his daughter; and *William* the Conquerour by his last will gave *Normandy* to *Robert*, *England* to *William*; and to *Henry* his mothers lands. If then things of greatest moment under Heaven were ordinarily disposed by the last Will, was it then probable that the smaller free holds should be of too high esteem to be credited to such conveyances? I would not be mistaken; as if I thought that Crowns and Empires were at the disposall of the last will of the possessor; nor doe I thinke that either they were thus in this Kingdome, or that there is any reason that can patronize that opinion; yet it will be apparent that Kings had no sleight conceit of the last will, and knew no such infirmity in that manner of conveyance, as is pretended; or else would they never have spent that little breath left them in vaine. I have observed the words of *Glanville* concerning this point, and I cannot finde that he positively denieth all conveyance of land by Will, but onely in case of disherison; the ground whereof is, because its contrary to the conveyance of the law: and yet in that case also alloweth of a disposing power by consent of the heire, which could never make good conveyance, if the will in that case were absolutely voide, and therefore his authority lies not in the way. Nor doth the particular customes of places discountenance, but rather advance this opinion; for if devise of lands were incident to the tenure in Gavell kind, and that so generall in old time, as also to the burgage tenures, which were the rules of Corporation and Cities, *Ubi leges Anglie deperiri non possunt nec defraudari nec violari*, how can it be said contrary to the common law? And therefore those conveyances of lands by last will that were in and after these times holden in use; seem to me rather remnants of the more generall custome, waisted by positive lawes then particular customes growing up against the

M. Paris
An. 1116.
Hoveden.
An. 1199.
Malmsh. nov.
l. 1.
Malmsh. l. 3.

Glanvil. l. 7.
cap. 1 & 5.

Ll. Gulielm.
cap. 61.

M. Paris
An. 1181.
Hoved. An.
1181.
Decret. Alex.
pap.
Hoveden.
fo. 587.

Glanv. l. 7.
cap. 5 & 16.

Ll. Edw. 37.

Glanv. l. 7. c. 6.
cap. 8.

common rule. Its true that the Clergy put a power into the Pope to alter the law, as touching themselves in some cases: for Roger Archbishop of Yorke procured a faculty from the Pope to ordaine that no Ecclesiasticall persons Will should be good unlesse made in health, and not lying in extremity; and that in such cases the Archbishop should possesse himselfe of all such parties goods: but as it lasted not long, so was himselfe made a preident in the case; for being overtaken with death ere he was provided, he made his will in his sicknesse, and Henry the second possessed himselfe of his estate. And its as true that Femme covert in these daies could make no will of their reasonable part, because by the Saxon law it belonged joyntly to the children. Nor could usurers continuing in that course at the time of their death make their will, because their personall estate belonged to the King after their death, and their lands to their Lords by escheate, although before death they lie open to no censure of law; but this was by an especiall law made since the Conquerours time; for by the Saxon law they were reputed as outlaws. Nevertheless all these doe but strengthen the generall rule, viz. that regularly the last will was holden in the generall a good conveyance in law. If the will were onely intended and not perfected, or no will was made, then the lands passed by descent, and the goods held course according to the Saxon law, viz. the next kinsmen and friends of the intestate did administer, and as administrators, they might sue by Writ out of the Kings court, although the Clergy had now obtained so much power as for the recovery of a legacy, or for the determining of the validity of the will in its generall nature it was transmitted to the Ecclesiasticall court.

CHAP. LXIII.

Of the Militia of this Kingdome during the reigne of these Kings.

IUndertake not the debate of right, but as touching matter of fact shortly thus much: that frō the Norman times the power of the Militia rested upon two principles; the one the allegiance for the common defence of the Kings person and honour and Kingdome; and in this case the King had the power to levy the force of the Kingdome, neverthelesse the cause was still under the cognisance of the great councell, so farre as to agree or disavow the warre, if they saw cause; as appeared in the defections of the Barons in the quarrell between King Steven and the Empreffe, and between King John and his Barons. The other principle was the service due to the Lord from the Tenant, and by vertue hereof (especially whenas the liberty of the Commons was in question) the Militia was swayed by the Lords, and they drew the people in Armes either one way or the other, as the case appeared to them: the experience whereof the Kings from time to time felt, to their extreame prejudice, and the Kingdoms dammage. Nor did the former principle over sway the latter, although it might seem more considerable, but onely in the times of civill peace, when the Lords were quiet and the people well conceited of the Kings aimes in reference to the publique, which happinesse it was Henry the seconds lot to enjoy; for he being a Prince eminent amongst Princes both for endowments of mind and of outward estate, not onely gained honour abroad, but much more amongst his own people at home, who saw plainly that he was for forraigne imployment of honour to the Kingdome; and not onely contented with what he had in England, but embarked together with the Laity against the growing power of the Clergy, for the defence and honour of the priviledges of the

Hoveden.
1181.

the Crown, wherein also the liberties of the people were included: They therefore were secure in the Kings way, and suffered themselves to be engaged unto the Crown further then they or their ancestors formerly had been, out of pretence of sudden extreame occasions of the Kingdome that would not be matched with the ordinary course of defence. For the King (finding by former experience that the way of Tenures was too lame a supply for his acquests abroad, and that it had proved little better then a broken reed to the Crown in case of dispute with the people) aimed at a further reach then the Lords or Commons foresaw; and having learned a tricke in *France*, brought it over, (although it was neither the first nor last trick that *England* learned to their cost from *France*) which was a new way of leavying of men and Armes for the warre, by assessing upon every Knights fee, and upon every free man, of the vallew of sixteen Marks yeerly, their certaine Armes; and upon every free man of ten Marks yeerely valew their certaine Armes; and upon every Burgesse and free man of an inferiour valew, their certaine Armes. 2. That these should be ready prepared against a certaine day. 3. That they should be kept and maintained from time to time in the Kings service, and at his command. 4. That they should not be lent, pledged, sold or given away. 5. That in case of death they should descend to the heire, who if under age should finde a man to serve in his stead. 6. That in case the owner were able he should be ready at a certaine day with his Armes for the service of the King *ad fidem Domini Regis & Regni sui*. 7. That unto this every man should be sworn: I call this a new way of levyng of Armes and men; not but that formerly other free men and Burgessees found Armes, albeit they held not by Knight service, for it was so ordained by the Conquerours laws formerly used: but now the King thrust in two clauses (besides the altering of the Armes) the one concerning the oath whereby all men became bound; the other concerning the raising and ordering of men and armes, which here seems to be referred to the King onely, and in his service; and this I grant may imply much in common capacity, viz. that all the power of the Militia

Militia is in *Henry* the second. But this trick caught not the people according to the Kings meaning: for the words *ad firmam Regis & Regni* still left a muse for the people to escape, if they were called out against their duty to the Kingdome; and taught the doctrine which is not yet repealed, viz. That what is not according to their faith to the Kingdome is not according to their faith to the King; and therefore they could finde in their hearts sometimes to sit still at home, when they were called forth to warre: as may appeare in one passage in the daies of King *John*, who had gathered together an Army for the opposing of forraine power, at such time as the Pope had done his worst against him and the whole Kingdome; which Army was of such considerable strength, as I believe none since the conquest to this day exceeded or paraleld it: but the Kings mean submission to the Popes Legate so distasteth the Nobles and people, as they left him to his own shifts; and that in such manner as although afterwards he had advantage of them and liberty enough to have raised an Army to have strengthened himselfe against the Nobles, yet the Lords coming from *London*, brought on the sudden such a party as the King was not able to withstand, and so he came off with that conclusion made at *Benny muse*, which though in it selfe was honourable, yet lost the King so much the more, because it was rather gained from him then made by him.

CHAP. LXIV.

Of the Government of *Henry the third*, *Edward the first*, and *Edward the second*, Kings of England. And first a generall view of the disposition of their government.

ONE hundred and ten yeares more I have together taken up, to adde a period to this first part of discourse concerning English government; principally because one spirit of

of arbitrary rule from King *Iohn* seemeth to breathe through-
out the whole; and therewith did expire. The first that presents himselfe is *Henry* the third, begotten
by King *Iohn* when he was in the very first entreprize of op-
pression that occasioned the first Barons bloody warres, and
which this King was so miserable as to continue for the grea-
test part of his life and reigne; and yet so happy as to see it
ended about four yeeres before he died. Although the soule be
not ingendered from the parent; yet the temperature of the
body of the child doth sometimes so attemper the motion of
the soule, that there is in the child the very image of the fa-
thers mind: and this *Henry* the third lively expressed, being
so like unto his father *Iohn* in his worst course, as if his fathers
own spirit had entered into him; and animated him in all
his waies. He brought in with him the first president of con-
science in poynt of succession by inheritance in the English
Throne; for the streame of probabilities was against him. He
was a child, and the times required a compleat man, and a
man for warre: He was the child of King *Iohn*, whose demerits
of the State were now fresh in the minds of all men. He was
also designed to the Throne by his fathers last Will, which was
a dangerous president for them to admit, who had but even
now withstood King *Iohns* depositing of the Crown in the
Popes hands, as not being in the power of a King of Eng-
land to dispose of his Crown according to his own will. Yet
leaping over all these considerations, and looking on *Henry*
the third as the child of a King, that by good nour-
ture might prove a wise and just King: they closed about
this sparke, in hope it might bring forth a flame whereby to
warne themselves in stormy times. Nor did their hopes soon
perish; for during his minority the King was wise to follow
good counsell, and by it purged out all the ill humours that
the kingdome had contracted in the rash distempers of his fa-
thers government: Nor did he onely follow the counsels
of others herein, but even at such times as their counsels pro-
ved, he chose those counsels that suited with the most popular
way; as is to be seen in the different counsels of the Archbi-
shop

shop of *Canterbury* and *William Briwere*. And yet two things troubled much those times: one that they were times of parties; the other, that the Protector was somewhat too excellent to be a meere servant; and its hard for the English Nobility to endure him to be greater; although it may seem reasonable that they that are thought worthy to governe a King should be much more worthy to governe themselves. But the Pope put an end to all occasion of question hereabout; for by his brieve he declares the King to be sixteen yeeres old, and of age to govern himselfe; and therefore all Castles are forthwith to be rendred up into the Kings hands. This proved the rock of offence, whiles some obeyed the Pope, and were impugnors of those that put more confidence in the Castles then in the Kings good nature. Hence first sprang a civill broyle, thence want of money, then a Parliament; wherein the grand charter of *Englands* liberties once more was exchanged for a summe of money. Thus God wheeled about successess. But the King having passed over his tame age under the government of wise Councillors, and by this time beginning to feele liberty, it was his hard condition to meet with want of money; and worse, to meet with ill Councillors, which served him with ill advice, that the grand Charter would keepe him down, make him continually poore, and in state of pupillage: to this giving credit, it shaped an Idea in his mind that would never out for forty yeeres after; and thus advised he neglects his own engagement, defies the government that by his Royall word, and the Kings his predecessors in coole blood had been settled; and that he might doe this without check of conscience, he forbad the study of the law, that so it might die without heire, and he have all by Escheat. This sadded the English, and made them drive heavily; the King (to adde more strength) brought in forrainers and forraine Councils; and then all was at a stand. The Councils were for new waies. The great designe was to get money to supply the Kings wants; and as great a designe was to keepe the King in want: otherwise it had been easie for those at the helme to have stopped the concourse of forrainers (other then

M. Paris
An. 1223.

M. Paris. An.
1223, 1224.

themselves) from abroad; the confluence of the Queenes poorer alies, lavish entertainment, profuse rewards, cheates from Rome, and all in necessitous times. But strangers to maintaine their own interests must maintaine strangeness between the King and his subjects; to supply therefore these necessities all shifts are used, as revoking of Charters, displacing of Officers, and fining them, Afforestations with a traine of oppressions depending thereon, fines and amercements, corrupt advancements, loanes, and many tricks to make rich men offenders, especially projects upon the City of London. Neverthelesse all proved infinitely short of his disbursements, so as at times he is necessitated to call Parliaments, and let them know his wants. At the first the people are sensible and allow supply; but after by experience finding themselves hurt by their supplies to the King, they grant upon conditions of renewing the power of the great Charter; and many promises passe from the King to that end, and after that oathes, and yet no performance; this makes the people absolutely deny supplies. Then the King pretends warres in France, warres in Scotland, and wars against the Infidels in the Holy land, whither he is going: the people upon such grounds give him ayds; but finding all but pretences, or ill successe of such enterprises, they are hardned against supplies of him for the holy warre: then he seems penitent, and poures out new promises, sealed with the most solemne execration that is to be found in the wombe of story, and so punctually recorded, as if God would have all generations to remember it as the scale of the covenant between the King of England and his people, and therefore I cannot omit it.

M. Paris.
An. 1233.

It was done in full Parliament, where the Lords Temporall and Spirituall, Knights, and others of the Clergy, all standing with their Tapers burning. The King himselfe also standing with a cheery countenance, holding his open hand upon his brest, the Archbishop pronounced this curse ensuing:

By the authority of God omnipotent, of the Sonne, and of the holy Ghost, and of the glorious mother of God the Virgin Mary, and of the blessed Apostles Peter and Paul, and of all the other Apostles,
and

and of the holy Martyr and Archbishop Thomas, and of all the Martyrs, and of the blessed Edward King of England, and of all Confessors and Virgins, and of all the Saints of God;

We Excommunicate and Anathematize, and sequester from our holy mother the Church all those which henceforth knowingly and maliciously shall deprive or spoile Churches of their right.

And all those that shall by any art or wit rashly violate, diminish or change, secretly or openly, in deed, word, or counsell, by crossing in part or whole those Ecclesiasticall liberties, or ancient approved customes of the Kingdome, especially the liberties and free customes which are contained in the Charters of the common liberties of England, and the Forrests granted by our Lord the King to the Archbishops, Bishops, Prelates, Earles, Barons, Knights, and Freeholders.

And all those who have published, or being published have observed any thing against them or their Statutes, or which have brought in any customes, or being brought in have observed; and all writers of Ordinances or Councils, or executioners, or such as shall judge by such things,

All such as are knowingly guilty of any such matters shall ipso facto incur this sentence: such as are ignorantly guilty shall incur the same censure, if being admonished be amend not within fifteen daies after admonition.

In the same censure are comprehended all perturbors of the peace of the King and Kingdome: for everlasting memory whereof we have bereunto put our Seales.

And then all throwing down their Tapers extinguished and smoking, they said, So let all that shall goe against this curse be extinct, and stinke in Hell. The King all the while continuing in the posture above mentioned, said, So God me help, I will observe all these things sincerely and faithfully, as I am a man, as I am a Christian, as I am a Knight, as I am a King crowned and anointed.

If we shall pare away the superstitious ceremonies, and consider divine providence, we may search into all Histories of all ages, and we shall not finde a parallell heretunto; so seriously composed; solemnly pronounced; with an Amen from the representative body of the whole Kingdome; put

in writing under seale, preserved to posterity ; vindicated by God himselfe in the ruin of so many opposers. And yet the dust of time hath almost buried this out of the thoughts of men; so as few even of such as know it do seriously consider how far it may yet and even now be charged upon the account of this Nation. Serious as it was, it was soon forgotten: nor would the King be long holden with promises, some unhappy Starre strooke him in his birth; he had been too hard for his promises, and now having the Pope at his elbow, he can dispence with his oath, and bid defiance to an execration; and in flat defiance of the grand Charter professeth oppression, accumulates forraine Councillors, and forraine guards, contemnes his own people, ushers in the Popes extortions upon them to fill up the measure; thrives in nothing but in the match of his sonne and successour with a sister of *Spaine*, and yet that also helps to hasten on the publike poverty, and that a Parliament that brought forth a bloody issue; although not by any naturall power, but occasionally: For the Barons mean now no longer to trust to promises; strangers are banished the Realme, and others of the English blood stepped into their places and Revenues. But this was not all, the King must confirme the grand Charter, and thereto he addeth not onely his own oath, but causeth the Prince his sonne to confirme the same in like manner. It is likewise propounded to him that the chiefe Officers of the Kingdome may be chosen such as the Parliament shall like of: And that other lawes meet for the government of the Kingdom might be established; of all these the King made no bones. And to make men believe that he was in good earnest, he was contented to disrobe and disarme himselfe, and invest the Barons both with Sword and Scepter, retaining nothing but the Crown for himselfe. This had been safety enough for the Kingdome, but that it was a conclusion without an agreement; for as it was on the Kings part made from a principle of shame and feare, so it was determined in anger; for after that the King had been thus drest and girt for the space of foure or five yeeres (whatsoever he thought all the while its no matter) he began first to stretch

stretch his conscience, and having the Popes dispensation to helpe, soon makes his oath to flie asunder (although his sonne had for the present more conscience.) But the other girt held more stoutly, for the Lords had the Sword chained to their arme by the Kings own grant. *Liceat omnibus in regno nostro contra nos insurgere & ad gravamen nostrum opem & operam dare ac si nobis in nullo tenerentur*; and the Lords maintained their hold, though not without some jealousies amongst themselves; & its very probable had the King been a little longer breathed with patience, he might have had his will upon ealier termes: for the Lords were not so jealous of one another as the Commons were jealous of the Lords, that they meant to rule onely for themselves. But the King being now in a wood, and bemired, so as he must now resolve to get all, or lose all, and so either sacrifice his naturall desires, or the remainder of his politicke power, entered the field with the ayd of those Commons that chose rather to be oppressed by one King then many Lords: and thus the Lords received the first blow, and gave the first foile: afterwards being worsted by their own divisions and jealousies, they left a victory to the King that might have made him absolute, if he had been moderate; but pursuing revenge too farre, he was distasted of his own party that looked on him as a Polyphemus that intended to devoure the enemy first, that he might more freely feast upon themselves in the issue: this made victory follow the King a farre off, and taught the King that the end of civill warre must be attended with moderation in the Conquerour, so farre as may stand with publique safety, or otherwise he that is conquerour to day by Sword, may be conquered to morrow by jealousie. Thus many humours consumed, and all parts tired after four yeeres continuall warre, the State commeth to its right wits. The Kings gaines in all this bloody sweat may be summed up in two heads: First, that he had liberty to choose his principall Officers of State by advice of the Lords, and them also to displace by like Councell. Secondly, in that he gained (though at a deere rate) wisdom to observe the state of affaires, and to apply himselfe according to occasion: so lived Henry the

Dan. An. 1258.

the third for three or four yeeres after these troubles; long enough to let the world know that he was able to governe like an English King, and to teach his sonne by his own late experience to be a wise governour betimes.

Edw. 1.

For *Edward* the first being trained up in the Tragedy of a civill warre wherein he was one of the chiefe actors; and having expiated the bloody way of his riotous youth by his holy warre, as they called it; now he betakes himselfe to amends making by justice in government, having found by his fathers experience that a Kingdom well governed (like good husbandry) preserves the owner, but being neglected destroyes both.

He came over in his third yeere in *August*, was crowned in *September*, summoned a Parliament in *February* following, but adjourned it till after Easter; and then it is found that the Church of late had been ill governed; the Clergy men grieved by many waies, the people otherwise handled then they ought to be, the peace ill kept, the laws lesse used, and delinquents lesse punished then was meet; and in the sence of these inconveniences were the laws of *Westminster* the first made, wherein the world may see the great difference between the Prince and the King in one and the same man.

Walsing. 46.

The most part of those laws were little other then plaisters applied to particular botches of those times, wherein the King dealt with a tender hand, as if he feared to ulcerate any part, and especially the Clergy, and therefore delivered the last law in a petitionary way to the Clergy, because it concerned the execution of justice in prohibited times, and yet bound up all with a *salvo* to himselfe and his prerogative, like a wise King that would neither loose right, nor doe wrong; nor yet stickle to debate with his subjects now when as his eye was upon a further marke. For *Leolin* the Prince of *Wales* had affronted him; and though he could not endure affronts, yet could he dissemble them for advantage, and so he suffered the Parliament to runne its course, that he might have done the sooner. Otherwise he had a feed of his fathers conceits that laws are not made for Kings, as appeared afterward: for after he had gotten his army into the field, he tooke a fifteenth which

which was granted to his father, and this was *in audito more*: M. West.
but there was no disputing with power, and therefore the sub- An 1276.
ject must be contented rather to score it up against the future,
then require present pay; so dangerous a thing it is for England
that Kings should have occasion to gather armies, though for
never so honourable employment.

The Welsh chafe is hotly pursued, yet it did not rid much
way, for it cost the English a voyage of nine yeeres travell be-
fore they could attaine the shore although it had been often
within their view. It may be the King found it advantagious
for his government to maintaine an Army in the field under
the colour of the Welsh warre, that he might more bow his
subjects to his own bent; for during these warres the King
made many breathings, and tooke time to looke to the hus-
banding of his own revenue, as those Ordinances called *Ex-
tenta marerii*, and *Officium coronatoris* doe witnesse, and the Sta-
tute of *Bigami*. But the people were not altogether yet tamed;
for the times being still in warres, and they occasioning much
waste of treasure, put the King to the utmost pitch of good
husbandry, and one degree beyond the same; so as under co-
lour of seising his own he swept up also the priviledges and
liberties of his subjects; some authours reciting the complaints
of the Church men, others of the Laity: so as it seemeth the
King was no respecter of persons, but his own. This and o-
thers not unlike had almost occasioned another combustion,
had not the meeting at *Glocester* settled things for the present,
by referring the right of franchises to debate in the Eyer; and
ordering refeisure of such liberties into the subjects hands,
whereof they had been dispossessed by *Quo warranto* and *Quo
jure*, under colour of the fourth chapter of the Statute of *Bigami*.

M. West.
Polyd. virg.

Neverthelesse however debonaire the King seemed to be, the
fore between him and his subjects was not fully cured; nor did
the Lords trust him further then needs must, for whether they
served in the field or met at councell, still they were armed; and
during this daring of each other were many profitable lawes
made, whiles neither party durst venture bloodshed in touch-
ing too nigh upon the priviledges of each other; principally
because

because the affaires in *Wales* were but laid asleepe, and upon reviving might turne the ballance to either side.

The wars awake againe, and therein are consumed nigh five yeeres more of the Kings reigne, so as what ever his intent was, he could have hitherto little opportunity to effect any thing for the advancement of the prerogative of the Crown at home. Nor had he scarcely breathed himselfe and army from the Welsh wars, but he found both *France* and *Scotland* his enemies at once. The King faced onely the first, and fought the second; which held him work the remainder of his daies, & at the same time also he arred both the Clergy and Laity at his own home as if providence had given him security for the good behaviour; and yet it failed him in the issue, and left him to the censure of the world, whether his justice was spontaneous or by necessity; for as yet he held the grand Charter at parley, and therefore was rather eyed then much trusted: Albeit he was put upon confidence in the subjects discretion for ayd. of him in his continuall undertakings; nor did they disclaime him herein, however chargable it was; for all seem willing he should be employed any where, so as not within the foure Seas.

Its probable the King knew it, and therefore having made a voyage into *France* he changed the Scene of warre, but to the other side as it were of a river, in hope his Lords would follow; but it would not be; this angered him, and he them: nor would his Clergy allow him any ayd *papa inconsulto*, and therefore he outs them from his protection; these and his irregular preparations for warre by summons not onely of his Knights, but all other that held Land worth 20 li. *per annum*, and taxes imposed by an arbitrary way increased rancour into a kind of state scoule, little better then a quarrell: for appeasing whereof the King granted a consultation upon a prohibition, and unto both Clergy and Laity a confirmation of the grand Charter at the long runne, and allowed it as the common law of the Kingdome, and seconded the same with many succeeding confirmations, in the 27, 28 yeeres of his reigne, as if he had utterly renounced all thought of a contrary way; but the Stat. in his 28th yeere had a sting in the taile that was as ill as his saving

Walsing. 69.

25 Edw. 1.

Saving of ancient ayds and prisals which was in the Stat. of confirmation of the Charters, though it were omitted in this Stat. for the saving was of such a sence as time and occasion would move the Kings heart to make it; and thus this Statute became like a *Hocum pocus*, a thing to still the people for the present, and serve the Kings turne, that he might more freely intend the conquest of the Scots; which once done, he might if he would try masteries with *England*. But God would not have it so; the King in *Scotland* had power to take, but could not overtake; and the Scots like birds of the prey had wit enough to fly away, and courage enough to return upon advantages: and so the King was left to hunt the wind, which made him to return.

He might now expect the applause of his people for his good successe, and the terrour of those that had stopped the broad way of his extravagant prerogative; and therefore looks bigge, rubs up old sores, and (having his Army yet in the field) sends for those Lords that would not follow him in his warres in *Flanders*: all come and submit, and as it were in so many words let the King know that all *England* is now tame, and like to be ridden at his discretion. And now there's nothing in his way but the fatall execration which he feared, not in relation to Gods anger; but rather to the exasperated Clergy, and the dread of the Popes direfull thunderbolt. To avoyd this storm he procures a dispensation from *Rome* to perjure and oppresse without sinne. A tricke that he learned of his father, and hid it within his breast till now about two yeeres before his end he brings it forth to tell all the world that hitherto he had been just against his will. But having obtained his purpose he neverthelesse misseth of his end, for a new King of Scots our old good enemies by divine providence suddenly crossed his way before him, and now it boots not to contend for arbitrary rule in *England*, and lose the Crown of *Scotland*, which he once thought he had sure; he faces about therefore, and having spoken faire to his people, for *Scotland* he goes. Thus if all were not in a parenthesis the King intended a good period, but God onely knowes what his furthest reach would have been if he had returned, for he was

Edw. 2.

taken out of this world in *Scotland*, and so left this his government somewhat like an imperfect sentence.

His sonne *Edward* should have compleated it, but that he wanted his fathers sence, and had too much of his grandfathers superbient humour, that meeting with a stiffe spirit, and a weak mind brought sudden fire into the course of government till it consumed it selfe in its own flame. For this King having newly slipt out of a bondage of wise government under his father, ranne the wilde chase after rash desires, spending his former time in inordinate love, and his later time upon revengesfull anger, little inferiour to rage, and so in his whole government was scarce his own man. His love was a president of a strange nature, that commanded him from all the contentments of his Kingdome to serve one nian, a stranger, and prostitute to all manner of licentiousnesse; meerely for some personall endowments. It shews that his judgement was weak, and his affections strong; and in that more weake, because he discovered it before he was crowned: like some of the weakest of the weaker sex, the birth of whose minds are borne as soon as they are conceived, and speake as soon as they are borne. Its true that bravery of Spirit may worke after absolutenesse in Kings under the colour of some kind of wisdom. But it is one thing to rule without law, and another to live without rule; the one dashes against the law of an English King, and may put on the name of policy, but the other destroys the law of mankind, and can beare no better name then of brutish desire.

1. Edw. 2.

All the while *Gaveston* was in view we finde nothing concerning common-weale or monument of Parliament, saving two Ordinances made by the King and such Lords as sited to the Kings way rather then to his wants. The first was that *de militibus*, the other *de frangentibus prisonam*; for all the Kings labour was to royallize *Gaveston* into as high a pitch as he could, and so to amaze his own eyesight with contemplating the goodlinesse of his person. So as *Gaveston* is become the image of the King, and presents his beames and influence into all parts of the Kingdome, and according to his aspect they often change

change and waine, & yet at the best were but as in a misty night

The Barons liked not this condition of state Idolatry; they were willing to adore the King, but they could not bow to an image: they desired nothing more then that their King might shine in his proper glory. Thrice is *Gaveston* banished; thrice he returnes; the last occasioned another civill warre, wherein *Gaveston* lost his head; thus the Lords removed the eclipse, but (little the better thereby) they finde it a vaine labour to compell the Sunne to shine by force when it hath no light. Though *Gaveston* be gone, the mist of forraine counsels prevaile; this was bred in the blood, fed with blood, and ended in blood. Through the glasse of forraine Councils all things seem of forraine colour; the King to the people, and the people to him. The King at length begins to see himselfe undervalued, and that it began in himselfe, ventures himselfe into the warre with *Scotland* to win honour; goes with much splendour, but returns with the greatest blot that ever English King suffered, confounded abroad, and sleighted at home. For the bravest men by ill successe are lost in common opinion: or, to speake in a higher strain, where God doth not blesse, man will not. The King thus almost annihilated, catches hold of *Rome*, fawnes on the Clergy, passes to them the Ordinances of *Articuli Cleri*, and *de prisio bonis cleri*: which lost the free men no right although it concluded the Crown. And to careesse the Commons made the Statute *de vice-committibus*, and the City of *London* likewise by the statute *de Gavelletto*. But God saw all sorts of nien runne at riot, and sends in upon the Nation plague, famine, and other extraordinary testimonies of his displeasure, even to the wonderment of other Nations; and this brought a kinde of sobriety into affaires, made all sorts tame, and for the present onely prepared them for better times. For the Kings time of longing, againe is come, and he must have new playfellows; findes the *Spencers*, or rather was found of them; they grow in honour almost beyond the reach of the Nobles, but not beyond their envie; and are more secure then *Gaveston* in this, that in their first sprouting the Kings Councell served himselfe and them to keepe in with the Com-

mions by making good lawes; such as the Statutes at *Yorke*, of *Essoines*; *Attaints* of Jurors, *Leavying* of fines; and *E-streates* into the *Exchequer*, &c. all of them promising good government. The Barons neverthelesse like not the *Spencers* greatnesse, and being by severall occasions exasperated, joyne in one, and occasion a new warre; the King aided by the Commons (who yet thought better of the King then of the Barons, whom they saw prejudiced rather out of selfe-apprehensions, then the publique good) prevailed against the Barons, and made them the first president of death upon the Scaffold.

Now the *Spencers* are Lords alone, thinking themselves above reach of the once formidable Barons, and the Commons too inferiour for their respect. Thus lifted up they take a flight like that of *Icarus*. They had so much of the Kings heart as they could not spare any part thereof to the Queen, and she being as loath to spare so much for them as they had, retired with the Prince to a reliefe which they brought from beyond Sea, and with whom both Lords and Commons joyne. The favourites missing of their wonted wings come down faster then they ascended, and together with them the King himselfe, all of them irrecoverably. Thus favourites instead of Cement between Prince and people becomming rocks of offence, bring ruine sometimes to all, but alwaies to themselves.

The King foresaw the storme, and thought it safest first to cry truce with the people, and come to agreement with them by common consent, for the extent of his prerogative in certaine particular cases questionable; and this summed up, become a Statute for future times to be a *ne plus ultra* between the King and people. The like agreement likewise was concerning services of tenants to their Lords; and an oath framed to vindicate them from all incroachments. And something was done to calme the Clergy for the demolishing of the *Templer* Knights, but the wound was incurable, words are not believed if actions doe not succeed; nor will oaths now made to bind Kings, Bishops, Councillors of State, Sheriffs, Majors, Bailiffs,

Prerog. Reg.
17 Edw. 2.

Stat. de
Homag.

Stat. Templar.

Bailiffs, or Judges to justice; nor directions for regulating of Courts, nor Ordinances against false moneys and weights, nor all of them settle the people; but they adhere to the Queen, burning with jealousy against the King, and both her selfe and the Lords with rage against the *Spencers*. The King flies, and being forsaken of the people, the Lords, the Clergy, his own sonne, and the wife of his own bosome, and of God himselfe, as the most absolute abject that ever swayed Scepter, lost the same; and being made a monument of Gods revenge upon inordinate desires in a King, and of the English people, being enraged, not long surviving his demise, he died a death meet to be forever blotted out of the thoughts of all subjects, but to be had in everlasting remembrance of all Kings. For if a Kingdome or Parliament misleads the King, at the worst he is but misled by his Councell; but if he be drawn aside by favourites, he must thanke his own lust; in the one he hath but the least share in the burthen, in the other he must beare the whole.

CHAP. LXV.

Of the condition of the Nobility of England till the time of Edward the third.

NOW was prerogative mounted up to the highest pitch, or endeavoured so to be; either through the weaknesse or power of these Kings, of whom the first and last had little to ground upon but their own will; and the other, I meane *Edward* the first, had more wisdom and power, but was otherwise distracted by forraine and more urgent employments; so as the worke fainted before it came to its full period. The contest was between the King and Barons, who till those daies were rather the great and richer sort of men, then Peeres, although they also were of the number. I am not so sharpe sighted as to reach the utmost intentions of the Lords; but
their

M. Paris.
An. 1217.

their pretences are of such publique nature, as its plaine that if their private interest was wrapped up therein, they were inseparable: and I shall never quarrell the Lords aime at private respects, whenas its plaine the publique was so importantly concerned; and yet I will not justifie all that I finde written concerning their words and Actions. The speech of the E. of Cornwall to his elder brother, and King Henry the third, *I will neither render up my Casile, nor depart the Kingdome, but by the judgement of the Peeres*: and of Simon the E. of Leicester to the same King, *That he lied, and were he not a King the Earle would make him repent his word*: and of the Lords that *they would drive the King out of his Kingdome, and elect another*: and of the E. Marshall to Edward the first, that *he would neither goe into Gascoine nor hang*; & such other doe savour of passion (especially that of the E. of Leicester and the Lords) and may seem harsh and unmannerly; and yet may admit of some alay, if the generall rudenesse of the time, the Kings injurious provocations, and the passions of colerick men be weighed together: Yet will not all these trench upon the cause, nor render the state of the Lords too high, or disproportionable to their place in the policy of the kingdome of England, as things then stood I say it was not disproportionable; for where the degree of a King was mounting up to such a pitch as to be above law, the Lords exceeded not their places in pressing him with their counsels to conforme to the laws; and in maintaining that trust that was reposed in them in keeping off such sinister counsels and invasions as might violate the laws and liberties, or hinder the currant of justice; concerning which I shall shortly state the case, and leave it to the censure of others. The government of the people of this Nation in their originall was Democraticall mixt with an Aristocracy (if any credit be to be given to that little light of History that is left unto us from those ancient times.) Afterwards when they swarmed from their hive in forraigne parts, and came over hither, they came in a warlike manner, under one conductor whom they called a King; whose power, whatever in the warre, yet in time of peace was not of that heigth as to rule alone; I meane that
whereas

whereas the Lords formerly had the principall executory power of lawes setled in them, they never were absolutely devested of that power by the accesse of a King; nor was the King ever possessed of all that power, nor was it ever given to him; but the Lords did ever hold that power the King concurring with them; and in case the King would not concurre the people generally sided with the Lords, and so in conclusion the King suffered in the quarrell. From this ground did arise from time to time the wanderings of the people in electing and deposing their Kings during the Saxon times. Nor did nor could the Norman *Williams* shake off this copartnership, but were many times, as well as other ensuing Princes, perswaded against their own minds and plotted desires. Nor can it otherwaies be supposed where Councils are setled; for whereto serve they, if (notwithstanding them) the King may go the way of his inordinate desire? If the Lords then did appeare against these Kings whereof we treat, in cases where they appeared against the laws and liberties of the people; it was neither new, nor so heinous as its noised, for them who are equally if not more intrusted with the Common-wealth then the King (by how much the Councillors are trusted more then the councelled) to be true, for the maintenance of their trust in case the King shall desert his. But the greater question is concerning the manner by threats and warre. Its as probable, I grant that the Lords used the one as the other, for it was the common vice of the times to be rugged; yet if we shall adde to what hath been already said, first, that Knight service was for the defence of the kingdome principally. Secondly, that the greatest power of Knight service rested with the Lords, not onely in propriety and ownership, but in point of direction for the benefit of the Common-wealth; and lastly, that the state of the times now was such as the kingdome was oppressed by strangers counsels, and the Councils of the kingdome rejected; that instead of law, garisons of strangers ruled; that no man could own his own, that the subjects were looked upon as enemies; and of all this the King made the principall instrument, who had ruled and over-ruled in this manner,

manner, and so was resolved to continue; I shall leave it to the better judgment of others what other healing plaister was to be had for such a sore. Albeit it cannot be denied, that more due respects might have been tendered to kingly dignity then was in those times practised: And yet there was a difference also in the occasions of warre, for certainly that last warre with *Edward* the second was more fatall, and yet lesse warrantable; and in the issue declared that there was more of the *Queene* therein then of the *Lords*, who knew a way of removing favourites from the King, without removing the King from the kingdom, or driving him out of the world. In all which nevertheless it cannot be concluded that the *Lords* party was increased more then in the former *Kings* times; for the losse of the field in *Henry* the thirds time against the Prince, kept them in awe all the succeeding reigné (although they were not then tongue tied) and their second losse against *Edward* the second, which was yet more sharpe, questionlesse quelled their spirits (although they lost no right thereby) and increased the *Kings* party much by the accesse to the Crowne of the services of such as held of those *Lords* that were attainted or disinherited: And yet by a hidden providence the King was little the better when it came to the pinch; for when *Edward* the seconds *Queen* came from beyond the Seas, though with but a small force, all forsake the King; neither regarding the former terrour of the Army of a King, nor the right of service, nor oath of fealty, nor promises, nor lawes, nor other engagements; and so the King becomes a prey to an enraged woman, or which is worse to a jealous wife: so little can the name of a King doe, when his person is despised; and so vaine for him to trust in his Militia, that hath already disarmed himselfe of the hearts of his Subjects. The summe then of all the labours of the Nobles during these times will rest in this, that they won the day, and yet lost the field: although they lost their own bloods and estates, yet they saved all to the people, and left laws in force able to debate with prerogative in the hand of any King that should succeed. Thus stood the matter in fact upon such grounds as it had, the validity whereof its not my worke

to censure neither by the ballance of Law or Gospell, but leave it as a sore time, that scarce will indure touch; nor beare a King further then he was good or brave.

CHAP. LXVI.

Of the state of the English Clergy untill the time of Edward the third: and herein concerning the Statute of Circumspecte agatis, Articuli Cleri, and of generall Councels and nationall Synods.

IT was a time of much action throughout the whole Christian State; and Rome now having attained to its full glory, began to be eyed on all parts, as an irregular motion crossing all affaires, that it may like the sole Empresse command all, and be controlled by none; and this wrought some stirrings in France, complainings in England, and facing between the Emperour and the Pope. How chargable this was to the Popes treasury its not materiall, but it occasioned or was pretended to be the occasion of all the intolerable exactions ensuing; there being scarce one yeere passed over without some extraordinary exaction leavied upon the Churchmen, either by provisors, tenths, procurations, levies for the Holy warre, Quindizmes, benevolences, or other such like; and where money was not to be had, by levies of Ornaments or of rich apparell; by intimation, begging perswading, commanding, threatning, and in this course continuing till they had out-faced shame it selfe, and that the whole law of Rome became comprehended in this one *Quicquid libet licet*. In generall therefore the Church of Rome cannot be said to thrive during these extorting times, although Rome did; for if the Laity were pillaged by the King, the Clergy much more both by Pope and King; if the one complained the other cried, the one sometimes found reliefe from the King, but the other was helpelesse, for the Pope had no eares to heare, not the King hands

M. Paris.
700.

M. Paris

H h

to

M. Paris.

M. Paris
 An. 1257.
 Vid. Addit.
 Baronius Anal.
 1306.

to helpe; he neither durst nor would crosse the Pope, although the Clergy told him that by these exactions they were impoverished in such manner as they were disabled to doe him service for their lay Fees. Thus *Rome* becomes a burden to *Rome*, and the members weary of bearing their head. Hereafter must the Pope beware of falling out with Kings, for the English Clergy now though late, see that all is not Gold that glisters; nor is it any great priviledge to be the Popes men further then the Pope will be a good master, but this was not to be expected; Popes were grown so excellent, as they could not amend; and *England* so enamoured of them, as its become their *vere hortus deliciarum*, as the Pope called it when he saw the rich vestments of the English Church men: And therefore they must now be contented to be the Popes viands as often as his hungry maw doth call, or otherwise they must fall out. An excellent posture of affaires, and brave preparative to dispose the hearts of all sorts for intertainment of the easie yoke of Christs government, which was now at the doore and ready to be revealed. Neverthelesse poore and mean as the Clergy was they had courage enough not onely to stickle both with King and people for their own liberties, but also to invade the liberties both of the Crown and Commons, having this advantage, that they had to doe with a King and people that were two; and themselves well seconded by the Pope, that had no lesse power in those times of publique distraction, and was bound to serve the cattell well that yeilded him so much milke. The particular matters of debate may appeare in their paper of grievances composed in *Henry* the thirds time, and their resolutions thereupon; their complaints were renewed againe in the time of *Edward* the first (if we may give credit to *Baronius*) after the Statute of *circumspecte agatis*. To the end therefore that the whole may lie before us, I shall set down the matter or substance of both these papers severally in regard they found much alike, and note the difference; all which I shall doe to the end that it may more plainly appeare what the Churchmens Idea was, and how farre the common law and Kings prerogative would agree thereto.

The complaints are of this nature s

1. That the Church-poffessions in their vacances are waffed, and that Escheators doe not onely feife the personall estate of the Abbot or Prior deceafed, but fuch Corne in the barne, and other goods belonging to the houfes, for their maintenance; as alfo the profits of Churches inpropriate.

3, & 4, & 5. Elections are either difturbed by the Kings Letters præceding, or by delay of the Royall affent fubfequent the faid elections.

6. The Lay power without the advice of the Clergy doe put in, eject, or reftore incumbents to Benefices voyd.

7. Prelates are fummioned to answer to the Lay power in the Writs *Quare excommunicavit*, and *Quare non admiffit*.

8. Clerks are diftrained in their Lay fees, to answer before the Lay power in action of debts, trespaffe, or other personall actions; and in cafe they have no Lay fees, the ordinary is diftrained by his Barony to caufe the Clerke to appeare.

9. The Laity are forbidden to take oath, or to inform upon oath before the Prelates, and to obey Prelates commands in fuch cafes.

10. Persons taken and imprifoned upon excommunication are ordinarily difmiff without fatisfaction unto the Prelate; and fometimes are not taken by the Sheriffe, notwithstanding the Kings Writ; and as well the King as his Officers doe ordinarily communicate with fuch as are excommunicated, and likewise command othersto communicate with them.

14. Clerks imprifoned for felony are refufed to be delivered to the Ordinary, unleffe upon feurity to appeare before the Juftices in Oyer, and fometimes are hanged before their Ordinary can demand them; and fometimes their heads are all fhaven that they may not appeare to be Clerks.

16. Juftices *itinerant* doe imprifon Clerks defamed for felony, or othsrwife outlaw them if they doe not appeare. And otherwife proceed againft Clerks after their purgation before the ordinary.

18. The Lay power feifes upon the eftates of Clerks degraded for crimes.

2.

11.

12.

& 33.

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17.

19. Clergy are compelled to answer and give satisfaction for offences against the forrest laws, before the Lay power: And in case of default the Bishop by distresse is compelled to order satisfaction, as well in such cases as in personall actions.
20. 22. Priviledges of Sanctuary are invaded by force.
21. 23. Executors of Bishops are hindred from administering the estate without licence first obtained from the King.
24. The Kings tenants goods are seised after their decease by the Kings Bailiffs.
25. Intestates goods are seised by their Lords, and their Ordinary hindred from administration.
26. The Kings prohibition passeth in case of Tythes and Chappels.
27. The like in cases of troth-plight, perjury, cerage, heriet, or other Church duties, as money for reparations of Churches, and fences in Churchyards, pecuniary punishment for Adultery, and costs of suit in Ecclesiasticall court, sacriledge, excommunication for breach of the liberties of the Church, contrary to the grand Charter.
28. 30. In cases of prohibition if the Ecclesiasticall Judge proceed contrary to the same he is attached and compelled to shew his acts in Court; if the Lay Judge determine the cause to be temporall the Ecclesiasticall Judge is amerced, if he proceed against the prohibition, and its tried by witnesses of two ri-baulds: and in case it be found for the Ecclesiasticall Judges cognisance, yet there is no costs allowed for such vexation.
29. 31. 32. That Jewes in matters Ecclesiasticall aforesaid are by the Kings prohibition drawn from the Ecclesiasticall Judge unto the Lay Magistrate.
33. 34. Question about Lands given in Frankalmoine are tried in the Lay courts; and by reason of such tenure the owners though Clergy men are compelled to doe suite at the Lay courts, and are charged with impositions, and are distrained hereunto, although the Lord have other Land of the Donor in Frankalmoine subject to his distresse.
35. 39. Prelates summoned to higher Courts are not allowed to make attornies to appeare for them in the inferior civill courts.
36. 41. Grantees

41. Grantees of murage or other unwonted impositions
compell the Churchmen to pay the same.

42 & 43. The Clergy are charged with Quarter, Cart-service,
and purveying.

44. The chancery sendeth out new Writs contrary to the
liberties of the Church, and the law of the Land without the
assent of the Councell of the kingdome, Princes and Pre-
lates.

45. The King doth compell the Clergy to benevolences to
the King at his voyage into forraine parts.

46. Amercements granted to Clergy men are turned into
fines by the Justices, and by them taken.

47. Clergy men are fined for want of appearance before the
Justices *itinerant*, and of the Forest upon common summons.

48. *Quo warrantos* granted against the Clergy for their li-
berties, and the same seised, unless they beset down in expresse
words in their Charter, notwithstanding that by long custome
they have enjoyed the same, and many times contrary to ex-
presse grant.

49.
50.

This is the summe of their paper of grievances; and because
they found the King either wilfull or unconstant, they resolve
upon a remedy of their own, by excommunication and inter-
diction, not sparing the persons of any principall or accessory,
nor their Lands, no not of the King himselfe; and for this
they joyn all as one man: Now what scare this made I know
not, but Henry the third in the Stat. of *Marlb.* and Edward the
first in his Stat. at *Westminster*, and other Statutes: the first
spake faire, and seemed to redresse some of these complaints; as
also did Edward the second, and yet the Common law lost little
ground thereby.

That which Henry the third did besides his promises of re-
forming was done in the Stat. of *Marlbridge*.

The Successors of Abbats, Priors, and Prelates, &c,
shall have an action of trespassse for trespassses done nigh
before the death of their predecessors upon the estates of
their

Marlbr. c. 29.

their Corporations. And shall prosecute an action begun by their Predecessors. And also shall have an assize against intruders into any of the possessions belonging to the said Corporations whereof their predecessors died seised.

This might seem a remedy provided against the first malady complained of, and questionlesse bound all but the King; and so might perchance abate somewhat the edge of that Article. But it being the Clergies reach to grow rich, and the Popes cunning to help on that worke, that they might be as stores for supply of his treasury; and had forbidden Abbats and other Prelates, &c. the liberty of disposing their estates by last Will. Kings therefore as supream patrons to these bodies in their vacances used to seise all the estates of the Prelates with the temporalties to their own use, as well to preserve the riches of the kingdome to it selfe, and the possessions of such Corporations from spoile, as to be a cloke of their own covetousnesse. And under the estates of the Prelates or heads of these Corporations all the Goods and Chattels belonging to the said Corporations were comprehended in regard that all was by law adjudged to be in the sole possession of such head, and without whom all the rest were accounted but as dead persons.

Fits Abbe 25.

Marlbr. c. 10.

No Clergie man is bound to attend at the Sheriffs Turne.

Gloss. p. 428.

Ll. Hen. 1. c. 37.

William the Conquerour first exempted the persons of the Clergy from attendance upon temporall Courts; yet they were still urged thereto, and especially by a Law in Henry the firsts time; but by this law they are discharged, and in some measure a provision made against the grievance in the 39th Article before mentioned. These amends we find made to the Clergy by Henry the third, besides his confirming the grand Charter: And his sonne Edward the first pursued the same course, especially in his first times, when he was but tenderly rooted: as may appeare in the Statute of West. 1:

Clergy

Clergy men nor their houses shall be charged with Quarter, nor their goods with purveyance or cart-service, under perill of imprisonment and dammages by action or imprisonment. West. 1. cap. 1.

The great endowments of Lands, Rents, and Revenues given to the Church-men by the Laity was for the maintenance of Hospitality and works of charity. The founders and benefactors hereby obtained a right of corody or entertainment at such places, in nature of free quarter, which in the necessitous times of Henry the third became so common that every one that had power never questioned right, and the King above all the rest; by meanes whereof the Church Revenues were exceedingly wasted: for remedy whereof all offenders are by this Statute made liable to fine and imprisonment, and double dammages in case of action of trespassse; the King only excepted, against whom they had no defence, but would rather have wonne him to have been their defence against the exactions from Rome that continually plagued them.

A Clerke taken upon felony, being demanded, shall be delivered to the Ordinary; but being indicted shall not be dismissed by the Ordinary without due purgation.

West. 1. cap. 2.

With due respects to the judgement of those grave and honourable persons of the Law, it seemeth to me that before the making hereof the use was, that if a Clerke was defamed or appealed by an offender for felony, before conviction he was forthwith imprisoned; nor could he be delivered unto the Ordinary upon demand before inquest taken, unlesse upon sufficient security to indure the triall before the Judges *inherent*; which thing was not easie to be had for a Clerke, as times then were. This Law therefore was made in favour of the Clergy, who required that such as were *Clerici noti & honesti* should forthwith upon their apprehending be sent unto their Ordinary, and those which were *vagi & incogniti* should upon demand be delivered to be judged by their Ordinary freely, and *non expectatis iudiciariis quibuscunque*: Such wandring

Co. 2. inflir.
164.
Scamf. 130.

M. Paris addit.
fo. 200, 206,
207.

Briton 4. fo. 11.

Bracton, lib. 3.
fo. 123.

West. 1. c. 5.

W. 2. c. 19.

dring Clerks therefore the Clergy will have delivered before inquisition if demand be made; Neverthelesse because the indictment passed many times before the demand came, (for by the 15 Article of the Clergies complaints foregoing, it appears that the Lay Judge made more then ordinary speed, for feare of stop.) This law provided that such also should be delivered to their Ordinary, and that due purgation should passe before the party were delivered; and in case the Ordinary neglected his duty herein, he was liable to a fine or amercement. Thus is *Briton* to be understood in this point; whereas *Bracton* speaking of such as are convicted, affirmeth that if demand be made of such as are not indicted (for of such he speaketh) they ought to be delivered without indictment: I suppose he meaneth by the Church law, for till this Statute the temporall Judges practice was otherwise, as appeareth by the 14 Article of the Clergies complaint foregoing; and so by this Law the 14 and 15 Articles of the Clergies complaint are answered.

Disturbers of the freedome of elections fined.

With submission to the judgement of others I suppose that this was framed principally for the satisfaction of the Clergies complaints in the third, fourth, and fifth Articles foregoing: and I am the rather induced hereto, because as touching elections into temporall places of government severall laws are especiall framed; such as are elections of Sheriffs and Coroners, whereof the one is *West. 1. cap. 10.* the other *Artic Super Cart. cap. 10.* and no law is especially made as touching the elections of the Clergy if not this.

Ordinaries having the Goods of the intestate shall answer his debts.

Originally the goods of the intestate passed by a kinde of descent to the children: afterward by a Saxon law the wife had her part; and this continued all the Normans time. But now the strength of the Canon law growing to its full pitch, after a long chase attached the prey. In *Henry* the firsts time they had gotten

gotten a taste, for although the wife and children, or next of kinne had then the possession, yet it was for the good of the soule of the deceased; and the Ordinary had a directing power therein, and so was in the nature of an overseer, and somewhat more. Afterwards in the time of King *John* the Clergy had drawn blood: for though the possession was as formerly, yet the dividend must be made in the view of the Church; and by this means the deviders were but meere instruments, and the right was vanished into the clouds, or as the Lawyers terme it in Abeyance. But in *Henry* the thirds time the Clergy had not onely gotten the game but gorged it; both right and possession was now become theirs, and wrong done to none but the Clouds. This was not well digested before *Edward* the first recovered part of the morsell; and by this law declared the use to be for the benefit of the deceased; and thus the one was satisfied in having what he used not, the other in using what he had not.

But these are but gleanings; the Law of *Circumspecte agatis* brings in a load at once: For the Clergy being vexed with the passing of the Stat: of *Mortmaine* (whereof hereafter when we come to speake of the Clergies losses) they make grievous complaints of wrongs done to their priviledges; and after six yeeres the King is at length wonne; and passed a writing somewhat like a grant of liberties; which before times were in controversie; and this grant if it may be so called hath by continuance usurped the name of a Statute; but in its own nature is no other then a Writ directed to the Judges, in substance as followeth:

Antiq. Brit.
194.

Take good heed that you doe not punish the Bishop of *Circumspecte*
Norwich and his Clergy if they hold plea in Court Chri- *agatis.*
stian of things meerely spirituall: for in such cases the
Ecclesiasticall Judge hath cognisance notwithstanding
the Kings prohibition.

Its therefore neither grant nor release, but as it were a covenant that the Clergy shall hold peaceable possession of what they had, upon this ground, that the Kings prohibition hath

*Circumspecte
agatis.*

no place in such things as are meerly spirituall. So as hereby the Clergy got a judgement against the Crown by confession, and an estoppel, upon this maxime that spirituall things belong to spirituall men, into which ranke the Kings person cannot come; thus thought they, but what are spirituall causes, and why so called? are they such as concerne spirituall persons, and things? this was the old way marke; but if we bring into this Category, Adultery, Fornication, Incest, &c. we shall marre all. *Linwood* tels us that *mere spiritualia* are such as are *sine mixtura temporalium*: there may be somewhat in this though I cannot finde it; nor can I make out the sence of the terme any other way, but to limit it to such things which by common custome the Ecclesiasticall Judge had cognisance of: for otherwise neither King nor law ever intended it to be expounded by the Canon, nor was it the intent of this Writ, Law, or Licence, (call it what you will) thus to conclude, as the particulars following will manifest.

Fornication, Adultery, and such like punished sometimes upon the body, and sometimes upon the purse.

Ll. Gullelm.
cap. 14, 19, 371.

M. Paris addit.
fo. 201. art. 18.

These crimes the Saxons punished by the temporall power, as I have already shewed. The Normans continued this course if we may believe the Conquerours lawes which gave the fine in such cases to the Lord of the delinquent. And it is confessed that *Henry* the first and the second continued it (as the Clergies own complaint just or unjust doth witnesse.) And what course was holden in the times of King *Steven* and *John* is to me unknown, nor is it much to be regarded, seeing the latter did he cared not what, and the former to gaine the good will of the Clergy regarded not what he did. The custome therefore cannot be made good for the Clergy, much lesse to punish the bodies of freemen in such cases, it being contrary to the grand Charter; never asked by the Clergy formerly, nor no complaint before now for deniall: for my part therefore I shall not apprehend it of a higher nature then the Kings Writ, which in those daies went forth at randome, if the 44th Article of the Clergies complaints foregoing be true. It being

so contrary to the common sence of Parliament to give the bodies of the free men to the will of the Clergy, to whom they would not submit their free holds. But the Writ proceeds in enumeration of particulars. *Circumspecte agatis.*

Reparations and adornings of Churches and Fences of Church-yards. Violence done to a Clerke, Defamation to reforme, not to give dammage. Perjury, oblations, payments of Tythes between Rect̃or and Parishioner: Right of Tythes between two Rect̃ors to a fourth part of the valew: Mortuaries due by custome: A pension from a Rect̃or to a Prelate or Advocate.

The most of which were under the power of a prohibition in the time of Henry the third, who was King but yesterday, as the Articles of complaint formerly set down doe manifest. Nor had the Clergy ever better title then connivance of some such favourites as King Steven, whose acts may peradventure be urged against Kings, but not against the people, unlesse their owne act can be produced to warrant it. The learning in the Princes case wil(I suppose) admit of a difference: for it can never be made out that the Kings Councell in Parliament was the *Magnum concilium Regni*, but onely the house of Lords; and therefore whatever passed in Parliament by their onely advice might binde the King, but could never reach the Commons nor their liberties. And thus the grand Charter in the first conception was conclusive to the King but was not the act of the Parliament, because the Parliament cannot grant a Charter to it selfe of that which was originaly custome. And therefore this law however countenanced can never be concluded to be other then a permission; not onely because it was never the act of the Commons of *England*, but because its contrary to the liberty of the free men; and its beyond all imagination that the Commons should out themselves from the protection of the Common law, and yoke themselves, their free holds, and estates under the bondage of the Canons; nor ought such a construction to be admitted without expresse words to warrant it. As for the conclusion,

Coke lib.8.

it is much worfe, and not onely dishonourable to the King in binding his armes from protecting his Subjects by the Common lawes, and so in some respects making them outlawes: but dishonourable to it selfe, whiles it makes prohibitions grounded upon Laws to be nullities by a late trick of *non-obstante*, which was first taken up by the Pope, then by Henry the third, and by this King granted to the Clergy: and thus are all set at liberty from any rule but that of licentiousnesse. Neverthelesse this Law did thrive accordingly, for we finde scarce any footsteps in Story of any regard had thereof till it became gray headed; For it was not long ere the King stood in need of money, and was necessitated to try the good wils of the Clergy more then once: this occasioned them to be slow in answer, and in conclusion to deny that they should ayd the King with any more money, *Papa inconsulto*. The King hereupon disavowes the Clergy, and leaves them to the Romish oppressions, which were many; and then the Clergy rub up all old sores, and exhibite their complaints to their holy Father, to this effect:

Antiq. Brit.
 vii. Winchelsy.

Baronius Ann.
 al. An. 1306.

1. That the Kings Justices intermeddle in testamentary causes, accounts of Executors, and cognisance of Tythes, especially to the fourth part of the Living.

2. That the Clergie were charged to the Kings carriages. That the Kings Mills were discharged from paying of Tythes. That Clerks attending on the Exchequer were necessitated to non-residency. And that after their deceale their goods were seised till their accounts were made. That Ecclesiasticall possessions were wasted during vacancies.

3. That Clerks were admitted to free Chappels by Lay men.

4. That the Kings Justices tooke cognisance of Usury, Defamation, violence done to Clerks, Sacriledge, Oblations, Fences of the Churchyards and Mortuaries.

5. That prohibitions are granted without surmise.

6. That Clerks are called to answer in the Kings court for crimes, and being acquitted the informers escape without penalty.

7. That Clerks are not allowed their Clergie.

8. That

8. That after purgation made, Clerks are questioned in the Kings court for the same offence.
9. That persons in Sanctuary are therein besieged.
10. That the Writ de Cautione admittenda issueth forth although the Church be not satisfied, and excommunicate persons being imprisoned are enlarged in like manner.
11. That debts between Clerks due, are determined in the temporall courts.
12. That Bishops are compelled by distresse to cause Clerks to appeare in Lay courts without cause.
13. That the Church looseth its right by the ceasing of rent or pension by the space of two yeeres.
14. That Nuns are compelled to sue in the Lay courts for their right in possessions befalling by decease of their kindred.
15. That Churches are deprived of their priviledges till they shew Quo warranto they hold them.
16. That Ecclesiasticall Judges are stopped in their proceedings by Sheriffs and great men.
17. That Bishops refusals of Clerks presented are examined in the Lay courts.
18. That patrons of Religious Houses do oppresse them by extreme Quarter.
19. That Bigamy and Bastardy are tried in Lay courts.
20. That the King suffers his Livings to be vacant for many yeeres.
21. That the Clergie are wronged by the Statute of Mortmaine.

Heres all, and more then all thats true; and more then enough to let the reader see that the Writ *Circumspecte agatis* was but a face put on for the present, after laid aside, and the Clergy left to the bare Canon. They likewise shew what the Clergy aimed at: and in that they did not obtaine was to be attributed to the resolution of the Laity, and not to any neglect in themselves; for the Archbishop died in the service, and its thought that grief for these maters was no little cause thereof. But the times within a while grew troublesome, and the King in pursuit of the French warres, being unadvised in his

*Articuli
cleri.*

Stat. de consul-
tat. 24. E. i.

in his way angered the people by his arbitrary levies of men and money, as it brought forth a State scoule, little inferiour to a quarrell. And to pacifie the Clergy he granted them the Writ *de consultatione habenda* in all matrimoniall and testamentary cases, which were of their least doubted priviledges; and this qualified the first Article of complaint next foregoing, if such cause they had of complaint; and this was all that the Clergy got at *Edward* the firsts hands. *Edward* the second was a man that was neither well affected to *Rome*, nor weake in spirit, and yet so unhappy that his way neither promised good successe, nor ever had it; and so he became a servant unto the humours of his servants, to keep his head above water; but especially after he was chased by the Scots, and quite out of breath, he calls for help of all, but first of the Clergy, and bespeakes them with the Ordinance of *Articuli cleri*; wherein he gives some satisfaction to the complaints formerly mentioned, which it seems by *Baronius* were exhibited in Parliament.

cap. 1.

Ecclesiasticall cognisance extendeth unto Tythes, Oblations, and Mortuaries, and to pecuniary recompence.

Ll. Alfred. c. 9.

Ll. Edw. cap. 6.

Ll. Canut. c. 8.

Ll. Gul. 20. cap.

Spicileg. 180.

Binius Tom. 7

fo. 661.

An. 1173.

In the first times neglect or deniall of Church-duties was punished in the Kings court by fine. Afterwards the Bishop was joyned in that worke, and the tythable goods were seised; eight parts whereof was taken to the Lords and the Bishops use by moities; a ninth part left to the owner, and the tenth to the Church; nor had the Bishops any peculiar Courts of cognisance of causes till the times of the Normans; nor as yet in those times had they power to all intents; for though it be true that the Roman tribute of *Peter-pence* was allowed by the Conquerours law to the Bishops court, yet we finde no law for Tythes and other profits to be recovered by the Ecclesiasticall court till about the end of *Henry* the seconds reigne, or King *Stevens* time; for at a Councell at *London* in *Henry* the seconds time it was ordained that three summons in the Popes name should be made to such as payed not their Tythes, and in case they then refused they should be anathema: and after that time in a Councell at *Oxford* under *Steven* Archbishop of *Canterbury*

whereby it was decreed that the Laity should be intreated first to pay their Tythes, and then if necessity require that they should be compelled by Ecclesiasticall censure: so as their power crept up by degrees in recovering of Church-duties, as it did in testamentary matters; and at length Henry the third worne and spent with the Barons warres, about his latter end yeelded to Boniface the Archbishop his importunate demands, and first gave liberty to the Clergy to be their own Judges; and yet the Lay Judges, although divers of them were Clergy men did not suddenly forbear till this law came, which gave some satisfaction to the first and fourth Articles of complaint foregoing.

Articuli cleri.
Baronius
Annal. 1212.
cap. 19.

Ecclesiasticall cognisance extendeth not to a fourth part of the Tythes of any Living, nor to pecuniary mulcts for sinne, saving by way of commutation. cap. 2.

The complaint of the Clergy in Henry the thirds time was against the Kings prohibition in case of Tythes indefinitely; for in those times & afterwards in Edw. the firsts time the Kings court had the cognisance of all Tythes, and therefore in the Statute of Westm. 2. c. 5. the Writ of *Indicavit* was allowed in case of right of any portion of Tythes; yet the Church still gained ground, and about or before the death of Edward the first the Temporall Judge had yeelded unto the Clergy the cognisance of a portion of Tythes under the value of the fourth part, (for in the Article next foregoing the Clergies complaint was that the Kings Justices held cognisance of the fourth part) & here they were confined thereto by this law, which the Clergy could never remove.

Artic. 1.

For violence done to Clerks the offender shall render damage in the Kings Court, but Excommunication, Penance, and Commutation shall be in the Bishops court. cap. 3.

The Canon law had an ancient claime to the Protection of Clerks both as touching their persons and estates; and prevailed so farre as they were thereby imboldned to offer violence unto others. But as I formerly shewed by a Law in Henry the seconds time the Temporall Judge resumed his originall power

Articuli
Cleri.

Fits. Hurb.
7 Hen. 3.
prohibition. 30

power; and this became a fore evill between the Clergy and Laity; for though it were allowed that Clerks should not be sued but before the Ecclesiasticall Judge in such cases, yet it was no warrant for the Laity likewise to be called before the Ecclesiasticall Judge in such cases; and therefore the Clergies complaints shew that the matter was not well, and that the Lay Judge generally maintained the Lay action, although sometimes he disclaimed it as it may appear in the case of a trespasse in the nature of a riot committed upon the priory of St Johns of Jerusalem in the seventh yeere of Henry the third, when as it was adjudged *per curiam* that it belonged to the Ecclesiasticall court to punish: But in Edward the firsts time, by the Ordinance of *Circumspecte agatis*; and Articles concerning prohibitions; the difference was made between damages and *proformationes*, and the same affirmed by this Law, and so the matter settled, and the fourth Article of the Clergies complaint in some measure satisfied.

cap. 4.

Defamation within cognisance of the Ecclesiasticall court; and corporall penance therefore, and Commutation.

The words are generall and peremptory with a *non obstante* the Kings prohibition, and yet the Law afterwards restrained the sence to defamation for crimes or offences triable in the Ecclesiasticall court: and this gave further satisfaction to the fourth Article of the Clergies complaint foregoing.

cap. 5.

Tithe of new Mills may be recovered in the Ecclesiasticall court.

Bineus Tom. 7
661.
L. E. l. c 8 & 9.

This Tythe of Mills was a new incroached Tythe never mentioned in any former law of this Kingdome, nor demanded by the Synod at London, Anno 1173. which mentions fruit trees, young broods of living creatures that are tame, Herbage, Butter, Cheese, with other particulars, but mentions not new Mills. Its true that anciently Mills payd Tythes, but such they were which were ancient and had payd the same by custome; and such as by Law in the Confessors time were declared to be given

given a Rege Baronibus & populo. But by the second Article of the Clergies complaint next foregoing it appeares that the Kings Mills refused to pay this Tythe ; now whether the new Mills were called the Kings Mills , as being made upon the publique streames by the Kings licence ; or whether the Mills newly made within the Demesnes of the Crown its not to be insisted upon ; but its evident that till this Law made the new Mills would not tythe their labours. Articuli cleri.

One and the same matter may be tried at the common Law after sentence in the Spirituall Court in divers respects. cap. 6.

The great sore that was complained of was that the Clergy after purgation in the Ecclesiasticall court made , were proceeded against in the Kings court in case of breach of peace , or felony, as may appeare out of the 16th Article of the Clergies first complaints, and the 8th Article of that taken out of *Baronius*. Neverthelesse the present law subjoynes an example of the questioning a Lay man in the Ecclesiasticall court in case of violence done to a Clerke as a matter which may be tried in the Ecclesiasticall court, and yet reviewed by the Kings court.

The Writ de Excommunicato deliberando shall not issue forth but upon evident breach of the Kings liberty. cap. 7.

This might be intended in satisfaction of the tenth Article of the Clergies complaint in *Baronius* , and the tenth Article in the Clergies complaint first recited ; although that complaint both in the 10, 11, 12, and 33 Articles seem to be but clamour upon Officers, and not the Kings court of justice.

Clerks Officers to the Exchequer are to be corrected by their Ordinaries ; and yet not tied to residence during their attendance on the Exchequer. cap. 8.

This is in part an answer to the second Article of the Clergies last complaint, and a justification thereof as a thing that is *pro bono publico*.

Articuli
cleri.
cap. 9.

Clergie mens goods shall not be distrained either in the high way or Sanctuary grounds, unlesse such as have been of late purchase.

The complaint exhibited in *Henry* the thirds time, and the 8th Article was onely in ordinary personall actions; but in the complaint made in *Edward* the seconds time Article 12. is that its without cause that they are so distrained. This law yeeldeth them somewhat, viz. immunity from distresse within their ancient possessions which had been by ancient custome priviledged, but yeelds nothing as touching their latter purchased Lands, because they had no such custome.

cap. 10.

High waies and Sanctuaries shall be free for such as abjure, so as they shall neither be restrained from liberty, nor necessaries kept from them. Felons may make free confession to the Priest without danger.

The grievance in the 22th Article of the Clergies complaint, in *Henry* the thirds time, and the ninth in that of the times of *Edw. 2.* are hereby relieved; provided that the delinquent keeps himselfe in due order.

cap. 11.

Houses of Religion shall not be oppressed with corodies, pensions or entertainments of great men.

This answered the grievance in the 42 and 43 of the first complaint, and the 18 of the latter, and in effect little other then what was formerly settled by *VVest. 1. cap. 1.*

cap. 12.

The Kings Tenants may be cited before the Ordinary out of their own Town, and if Excommunicated for want of appearance, the Writ de excommunicato capiendo shall be awarded.

A remedy this was against the grievances in the 12 and 33 Articles of the first complaint, and in the 10th Article of the last scedule of complaints. And thus the Clergy have gotten the day of the Kings Tenants, which they had been striving for ever since the conquest, as may appeare by what hath been formerly

formerly said; and now the Kings Tenants are in no better condition then other men, viz. they may now be excommunicated without the Kings licence: nor is the answer *Nunquam fuit negatum* to be referred to the point of Excommunication; for that power was denied them but unto the eiting them out of their own Parishes, which cannot be found to be denied to the Clergy by any thing that yet appeareth.

A Clerke presented and found unable by the Ordinary shall be tried againe by the Ecclesiasticall, and not the Lay Judge. cap. 13.

Although the fitnesse or sufficiency of the party presented is to be examined by the Ordinary, yet the civill Magistrate hath power in action brought to inquire and determine whether the Ordinaries worke was rightly done, and so the 17 Article of the last complaint answered.

Elections shall be free.

cap. 14.

The law was of the same with this in the Stat. *W. 1. cap. 5.* which see before; and it may be that the iniquity of the times continued notwithstanding and so occasioned the renewing of this law.

A Clerke having taken Sanctuary shall not be compelled to abjure. cap. 15.

Nor after confession of the crime, or appealing others before the secular Judge shall be denied his Clergie. cap. 16.

Although the Temporall courts proceeded not so farre as to passe sentence against a Clerke that had taken Sanctuary; yet they proceeded to inquiry, as may appeare by what was said formerly concerning the Stat. *West. 1. cap. 2.* and therefore though this law in the 15th Chap. alloweth that a Clerke in Sanctuary shall enjoy his Ecclesiasticall liberty, yet the words *legi Regni se reddens* are interposed; and the reason is, because the King upon indictment found had right to the delinquents goods and profits of his lands untill due purgation, and then his Lands were by a Writ out of the Chancery to be restored to

7 E. 3.
Fits. tit. for
faiture 34.

him againe; nor could any purgation regularly passe before the party was indicted.

Stat. de asport.
 relig. 35 E. 1.

No religious House shall be charged with taxe to any superiour without the Realm of England; nor shall send to any visitation out of England.

This was neither at the request of the Clergy nor act of kindnesse intended unto them but for the good of the Kingdome, to prevent the bleeding of the treasure of the Kingdome into forraigne parts.

Mag. carta
 cap. 35.

Patrons of Abbies shall have their custody during their vacancies.

This was the ancient Law now revived by the Clergies consent and intended for the safegard of the Revenues of the Houses, and their maintenance; and therefore its with a *secus superius dictum est*, cap. 5.

Stat. de pris.
 Edw. 2.

The goods of the Clergy freed from purveyance, unlesse they will.

It was a favour given by Edw. 2. to the Clergy to gaine their good will after the death of Gaveston the shamefull defeat received in Scotland, and some particular testimonies of Gods displeasure, whereof he began to be somewhat sensible.

Stat. de quo
 Warranto.
 18 Edw. 1.

Franchises holden by prescription or charter confirmed, and trials by Quo warranto allowed to be in eyer.

It was the common share of the great men, but especially of the Clergy to have their franchises exposed to the prey of the Eagles, or to such as hauked for them; and its likely the King had not so easily forgone his prise, if all the fat had faln to his own share; but perceiving that more benefit came to his instruments then was meet, and himselfe little the better thereby; he sacrificed his Judges to the people, but it was to his own behoofe, and so gained both credit and favour from the people, and profit to himselfe; and in some measure satisfied the 48, 49, 50. Articles of the Clergies complaint in the
 time

time of Henry the third, and the 15th Article of their last complaint.

Lands or Tenements aliened to a Religious house shall escheate to the Lord, if the alienor take the same backe to hold of that house.

Mag. carta
cap. 37.

The ground hereof principally was the prejudice done to the Lord by destruction of the tenure albeit that it had been an ancient grievance complained of in the Saxon times that the Clergy were covetous, and swallowed down estates, and thereby weakened the Kingdome: But now they are become even cheaters, serving the turnes of treacherous tenants that would give their Lands by compact with the Church men to receive them againe from them to hold of the Church, which was a liberty that men thirsted after in those times wherein the Church men were more adored then their Images. It seems this Law was made after *Bractons* time, if that be true in the second institutes: for he saith that a man may give his lands to any one, whether Christian or Jew, or religious person, and nothing shall hinder it but the speciall reservation of the donor; and yet he saith that such gift or grant taketh not away the right of the Lord Paramount in his tenure, albeit the gift be in free almes. Neverthelesse it seemeth to be such restraint as the Templers and Hospitallers were faine to find out a new way, which was to protect mens tenements from execution of law by levying crosses thereon, albeit the right of the Lords was not barred; and therefore *Edw. 1.* provided a law to make this also in nature of a Mortmaine within the Statute made in the seventh yeere of his reigne, called the Statute *de Religiosis* by which it was enacted that in case of such alienations in Mortmaine the Lord should have liberty to enter; if he failed then the Lord paramount, or if he failed the King should enter and dispose of the same; and that no licence of Mortmaine should be sued out but by the mean Lords assent; and where part of the premises remaine still in the Donor, and the originall Writ mentioneth all the particulars And thus at length was this issue for the present staied which hitherto

Bracton, lib. 1.
fo. 13.
Coke. 2. instit.
super Magna
carta cap. 36.
p. 74, & 75.
Bracton lib. 2.
cap. 10, fo. 27.

Stat. West. 2.
cap. 33.

Stat. de
Religiosis.
7 E. 1.

Stat. de A-
mortizandis
terris.

M. West.

An. 1280.

Mag. carta
cap. 39.

Miror Just.
cap. 5. sec. 3.

Malmsb. de
gest. Reg. lib. 2.

Ll. Edw. cap. 9.

Braeton lib. 3.
cap. 7. fo. 106.

therto waited the strength of the Kingdom, and by continuall current emptying it into the *mare mortuum* of the Clergy consumed the maintenance of Knight service, by converting the same to Clerk-service.

No Iudge shall compell a free man to make othe without the Kings command.

So is the sence of the law rendred by an ancient authour; and I hope I shall not wrong the Text if I affirme that the Ecclesiasticall Judge was included within the equity, though properly he be not *Balivus*; for the Law intends to shew that its a liberty that the subject hath, not to be compelled to take oath without the Kings especiall command: and by consequence it sheweth also that the King at that time, and untill then had the directory of oathes; for it was an ancient liberty given in the Kings charters unto such as they pleased, viz. to impose oathes, and to punish for breach of oath, and this passed under the word *Athe* or *Athas*; and so Edmund the Saxon King gave to the Abby of *Glastenbury* amongst other *Athas & Ordulas*; and the Churchmen that first procured vacations from suits of law during holy times, procured a law also to be setled by *Edward* the Saxon King and *Gunthorne* the Dane, that Ordeale and oathes should be forbidden upon the holy Feasts and lawfull fasts. And a wonder it is how it escaped the gripe of the Clergy so long, who catched at any thing that had but a glance of Gods worship in it. And if this were the subjects liberty not to be compelled to sweare, surely much more not to be compelled to accuse himselve, unlesse by the law he be especially bound; for it is *Glanviles* rule, *Ob infamiam non solet juxta legem terre aliquis per legem apparentem se purgare nisi prius convictus fuerit vel confessus in curia.* But the power of the Clergy now was grown strong, and they begin to remember themselves; and that oathes are of a holy regard, and they men for holinesse best able to judge when and to whom they shall be ministred, and therefore now they begin to enter their claime, and to make a sure title, they get a grant from Pope *Innocent* to *Steven Langton* Archbishop of *Canterbury*

bury of a faculty of licencing administration of oathes during the time of Lent; and he accordingly enjoyed it during the mad time of Henry the third. But Edward the first quarrelled it, and left it questionable to Edward the second, who being in his condition as a lost man had lesse care of such smaller matters, and therefore allowed that his Judges of Assizes should be licenced by the Archbishop to administer oathes in their circuits in the sacred times of *Advent* and *Septuagesima*: and this course continued till Henry the eighths time. The Clergy having thus gotten the bridle, gallop amaine: they now call whom they will, and put them to their oathes to accuse other men or themselves, or else they are excommunicated; Henry the third withstood this course, if the Clergy mens complaints in the times of that King, Artic. 9. be true, and notwithstanding the same the law holds its course, and in pursuance thereof we finde an attachment upon a prohibition in this forme ensuing.

Antiq. Brit.
Eccles. 209.

Put the Bishop of N. to his pledges that he be before our Justices to shew cause why he made to be summoned, and by Ecclesiasticall censures constrained Lay persons, men or women to appeare before him to sweare unwillingly at the Bishops pleasure, to the great prejudice of our Crown and dignity, and contrary to the custome of the Kingdome of England. And thus both King and Clergy were at contest for this power over the peoples consciences, to which neither had the right otherwise then by rules of law.

R. gift. fo. 36.

Bigamists shall not be allowed their Clergie, whether they become such before the Councill of Lions, or since; and that Constitution there made shall be so construed.

Stat. Bigam.
4 Edw. 1. cap. 5

Whatsoever therefore their Synods in those times pretended against the married Clergy seemeth by this law that they had Clergy that were married once and againe; and yet before and after the Councill were admitted as Clerks in the judgement of the Law. But the Generall councill interposes their authority, and deprives them that are the second time married of all their priviledges of Clergy. It was it seemeth

twenty

Generall
councils.

Bineus tom. 13
Pl. 2. pag 674.
M. Paris.

M. Paris
An. 1245.

twenty yeeres and more after that Councell before the Churchmen in England were throughly reformed, for either some were still *Bigami* at the making of this law, or as touching that point it was vaine; nor is it easie to conceive what occasion should after so long a time move such exposition, the words of the Constitution being *Bigamos omni privilegio clericali declaramus esse nudatos*. Now whither this slow reformation arose from the defect in law, or in obedience thereto, may be gathered from some particulars ensuing. First, it is apparent that the canons of Generall councils *eo nomine* had formerly of ancient times gotten a kind of præminence in this Nation; but by what meanes is not so cleare. In the Saxon times they were of no further force then the Great councell of this Kingdome allowed by expresse act. For the Nicene faith, and the first five Generall councils were received by Synodicall constitutions of this Kingdome made in the joynt meeting both of the Laity and Clergy; and during such joynt consulting the summons to the Generall councils was sent to the King to send Bishops, Abbats, &c. but after that the Laity were excluded by the Clergy from their meetings, and the King himselfe also served in the same manner; the summons to the Generall councell issued forth to the Bishops immediately, and in particular to each of them, and to the Abbats and Priors in generall; by vertue whereof they went *inconsulto Rege*, (and sometime *Rege renitente*) and appeared either personally or by proxy. Others came as parties to give and receive direction, or heare sentence in matters tending to spirituall regards: and for this cause issued summons sometimes even to Kings; as at the councell of *Lions* aforesaid, its said that the Pope had cited *Reges terre & alios mundi principes & dictum principem*, meaning *Henry* the third; the matter was for assistance to the holy warre; and to determine the matter, *Henry* the third, and his Clergy men. And as in that case so in others of that kind, Kings would send their Embassadours or Proctors, and give them power in their Princes name *interessendi, tractandi, communicandi & concludendi*. First, of such matters *que ad reformationem Ecclesiæ universalis in capite & membris*, then of such as

concerne

concerne *fidei orthodoxæ fulciamentum*, *Regumque ac principum pacificationem*, or any other particuler cause which occasionally might be incerted: so long then as Kings had their votes in the Generall counsels, they were ingaged in the maintenance of their decrees; and by this meanes entred the Canon law into Kingdomes. Nor was the vote of Kings difficult to be obtained, especially in matters that trenched not upon the Crown; for the Pope (knowing well that Kings were too wise to adventure their own persons into forraine parts where the Generall counsels were holden, and that it was thrift for them to send such proctors that might not altogether spend upon the Kings purse) allowed Bishops and Clergymen to be Proctors for their Princes, that in the negative they might be *pii inimici*, and lesse active; but in the affirmative zealous: and so make the way wider by the Temporall and Spirituall vote joyned in one. Neither did Kings onely save their purse but they also made their own further advantage hereby; for by the ingagement and respect which these his proctors had in counsels, they (being for the most part such as were had in best esteem) obtained better respect to the cause that they handled, and speedier dispatch.

Neverthelesse the case sometimes was such as could not expect favour, and then as the Kings temper was they would sometimes ride it out with full saile, and to that end would either joyn with their Ecclesiasticall Proctors some of the Barons, and great men of their Realme, to adde to the cry, and make their affaires ring louder in the eares of fame (although the Pope had the greater vote) or otherwise would send an inhibition unto their Proctors and their assistants; or an injunction to looke to the rights of the Crown (as *Henry* the third did at the counsell at *Lions*) and this sounded in nature of a protest, and (within the Realm of *England*) had the force of a proviso, or saving. But if the worst of all came to passe, viz. that the counsell passed the cause against Kings without any inhibition or injunction: yet could it not bind the law of the Land, or Kings just prerogatives, no not in these times of *Romes* hower, and of the power of darknesse. For at a Synod

Bineus Tom.3
P^o.2. pag. 913.
& Tom.4. P^o.1
pag. 14.

Foxe Mart.
P^o.2. 263.

Antiq. Brit.
Eccles. fo. 209.

holden by Archbishop Peckam, An. 1280. the acts of the Councell of Lions was ratified, and amongst others a Canon against non residency and pluralities; and yet neither Councell nor Synod could prevaile. for in Edward the seconds time an Abbat presenting to a Church vacant (as was supposed) by the Canon of pluralities the King whose Chaplaine was disturbed enjoyned the Abbat to revoke his presentation upon this ground *Cum igitur &c.* in English thus: *Whereas therefore that decree bindeth not our Clerks in our service in regard that the Kings and Princes of England from time to time have enjoyed that liberty and prerogative that their Clerks whiles they attend upon their service shall not be constrained to undertake holy things, or to be personally resident on their benefices, &c.*

30 aff. pl. 5.

And if this present law be considered whereof we now treat, which tooke leave to enact a sence upon a former Canon so long since made; and (which is all one) to make a generall Councell (will or nill it) to tread in the steps of an English Parliament, or (which is more mean) to speak after the sence of an English Declaration that had not yet attained the full growth of a Statute, as was then conceived; it will evidently appeare that the power of a Councell made up of a mixture of a few votes out of severall nations, or the major part of them being unacquainted with the Laws and customes of Nations (other then their own) was too meane to set a law upon any particular Nation contrary to its owne originall and fundamentall Law. And as the voters sent to the generall Councils from England were but few, so neither were the Proctors, as may appeare from this, that Pope Innocent out of his moderation, if we may believe it; and to avoyd much expence, as he saith, did order that the number of Proctors in such cases should be few: but in truth the times then were no times for moderation amongst Popes and their Officers, and therefore it was another thing that pinched; for multitude of Proctors, if their number had not been moderated, might perhaps if not prevaile yet so blemish the contrary party, that what the Pope should get must cost him losse of spirits if not blood; and although the Bishops being fast friends to the Pope by vertue
of

of their oath did prevaile in power, and the Pope had the controll of the Councell; yet the exceeding number of the Proctors on the contrary might render their conclusions somewhat questionable in point of honesty, as being made against the minds of the greater number of persons present, though their votes were fewer. To avoyd this difficulty therefore for more surety sake the Popes enlarged the number of the voters; for whereas it seemeth to be an ancient rule that onely foure Bishops should goe out of *England* to the generall Councell, in after ages not one Bishop could be spared unlesse in cases of great and emergent consequence; as may appeare by the Popes letter to *Henry* the third, and the case required it: for the oppressions of the Pope began to ring so loud, as the holy chaire began to shake. Neither did Kings confine themselves to any certaine number of Proctors, notwithstanding the Popes moderation; but as the case required sent more or lesse, as unto that Councell at *Pisa* for the composing and quieting that great schisme in the Popedome, *Henry* the fourth sent sollemne Embassadours, and with them nigh eighty in all. But unto the Councell at *Basell*, *Henry* the sixth sent not above twelve or thirteene, as Mr *Selden* more particularly relateth. And unto the councell at *Lions* formerly mentioned the Parliament sent but six or seven to remonstrate their complaints of the extorsions of the Court at *Rome*, their Legates and Emiffaries. The summe of all will be that the Acts of generall Councils were but councils which being offered to the sence of the Parliament of *England* might grow up to the degree of Lawes, if the Parliament liked them.

Hoveden.
An. 1179.

M. Paris
An. 1245.

Spicil. 215.

Neverthelesse Nationall Synods in *England* undertooke the quarrell of Generall councils: for Archbishop *Peckham* in a Synod 1280. enjoyned the constitutions made in the Councell at *Lions* to be observed under a curse without consultation first had with the Parliament, or before he knew whether they would be right or wrong; and before him *Boniface* made constitutions in opposition to the customes of the Kingdome, so as the matter was now come to a kinde of contest whither Synods or Parliaments should hold supremacy in doubtfull

Synods.

Rot Parliam.
 18 H 3. num.
 17.

cases concerning the limits of the Ecclesiasticall and temporall power: for henceforth Kings must bid *adieu* to the Synods, and sit no more amongst them; and Synods now thinke themselves free to consult and determine what they please without speaking under correction; nor was there other remedy left to Kings but threats, by Writs directed to the Bishops *firmiter inhibendo quod sicut Baronias quas de Rege tenent deligunt nullo modo presumunt concilium tenere de aliquibus que ad coronam Regis attinent vel que ad personam Regis vel statum suum vel statum concilii sui contingunt, quod si fecerint Rex inde se capiet ad Baronias suas.*

Stat. Merton.
 cap. 9.

And this prevailed so farre as the Bishops durst not adventure too farre lest they should goe beyond their guard; and therefore they come and aske leave of the Parliament in cases that trenched upon the Law of the Kingdom, as they did in the case of bastardy, wherein they would have had their consent that children borne before marriage to be made legitimate by the marriage subsequent; and yet they could not prevaile, for they were answered *Nolumus leges Anglie mutari*, notwithstanding that the Canon law, and the laws of the Normans sided with them; and so they obtained not their desire, although they still retained the triall of generall bastardy unto themselves.

Antiq. Brit.

Neverthelesse the times were such as Kings being too weakly assisted by the people, and the Clergy strongly seconded by the Pope, they tooke advantage of those times of distraction so as to hold themselves no further obliged to the King then the Pope and their own covetousnesse would allow them; and to make all sure, they had settled it so farre as they were able by a constitution, that the Clergy were not bound to ayd the King *Papa inconsulto*; and they put it in practise in a Synod under Archbishop *Winchelsea*, Anno 1295. in the time of *Edward* the first; and although the King prevailed in the conclusion at that time, yet from the times of *Henry* the third the Clergy for future times granted their aides to the King by themselves, and a part from the rest of the body of the Kingdome, and held themselves not bound by any ayd granted by the Parliament;

ment, albeit that their own ayds granted in their Synods were not obligatory unto the body of the Clergy in this Kingdome, unlesse first allowed and confirmed by the Parliament. And thus is England become like a two bodied monster supported with one paire of legs.

CHAP. LXVII.

Of the condition of the free men of England of the grand Charter and other Statutes during the reignes of these Kings.

Shattered asunder by broiles of Civill wars, the free men having laid aside that regard of the ancient mutuall covenant and bond of Decenners are now become weake, and almost intralld to the lust of Kings, Lords, Pope, and English Clergy; and therefore its no wonder if taxes and tributes were many and new although most of them deserved not to march under any Banner but the colours of oppression; nor did any thing save them from the worst tenure of all, but the severall interests of those superiour powers which oftentimes did juttle with one another, and thereby gave the Commons liberty to take breath so as though for the present they lost ground and hunted upon a coole sent, yet they still retained the prey within their view. Sometimes they were cast farre behind; other times they recovered themselves; a truce is cried, and laws are made to moderate all, and determine the bounds of every one; and thus comes the grand Charter into the Publique Theater. The Historian saith it was the same with that of King *Johns* framing; and yet by comparing them together we finde them disagreeing both in words and sence, and therefore shall sum the same up as shortly as I can, observing the difference of the two Charters as I passe along. The first Chapter concerned the Church, of which sufficient hath been spoken.

Mag. cart. 1.

The Free men shall enjoy these liberties to them and their heires for ever.

cap. 1.

The

Mag. carta.
cap. 3.

The heire in Knightservice shall pay the ancient reliefe.
That reliefes were fetled by the Saxons hath been already shewed, and also that they were continued and confirmed by Henry the first: onely in those times they were payed in Horses, Armes, &c. but in after times all was turned into money, which was more beneficiall for all.

cap. 4.
Vide Stat. de
Wardis, 28 E. 1

Lords shall have their Wards bodies, and Lands after homage received untill the full age, though the Ward be formerly Knighted.

Glanvil. lib 6.
cap. 1. & 4.

The Law of Wardship may seem more anciently seated in this Kingdome then the Normans times, for if the Statutes of Scotland beare any credit, that Law was in Scotland before those times. The Lords were not to have the Wardship before they were possessed of the tenure because it was theirs as a fruit of the tenure, according to the Saxon law concerning distresse, that it could not be in the power of the Lord to distraine till he was possessed of the service. And if by fraudulent conveyance the heire did hold the Lord out of possession, a Writ of Ward did lie against him; and if he did not appeare the Lord might seise the Lands, unlesse in case of Wardship *per cause de guard*.

Stat. Marlbr.
cap 6 & 7.

Stat. Marlbr.
cap. 16. &
prerog. Reg.
cap. 3.

And in case the Lord would hold the Wardship longer then the full age of the heire, an Assize did lie against the Lord, for the heire could not enter without livery. But if the heire were of full age at the time of the ancestors death, the Lord could not enter the Lands; and yet he should have a reliefe, and the primer seisin.

Prerog. Reg.
cap 13.

And if the heire entered the Lands before homage done, he gained no free hold, though he were Knighted before, as this Law provideth: for it may seem that these times of civill warre brought forth a trick of Knighting betimes, as an honourable encouragement for young sparks to enter the field before they were compleat men of discretion to know whether the cause of warre was good or evill: and yet reason might induce a conceit that he that was thought meet to doe Knightservice in his own person might expect the maintenance fit for the ability of the person and honour of the service.

Grantees

Grantees or their assignes or Committees of Wardships Mag. carta.
shall preserve the Land, &c. from waste, and the tenants cap. 5.
from extortion.

They shall yeeld up the same stocked if they receive them cap. 6.
stocked.

The first of these is the law of common reason for its contrary to guardianship to destroy that which by their office they ought to preserve. As touching the words of the Law the Grantees are omitted in the Charter of King *John*; and also their assignes albeit that doubtlesse they were within the intent and meaning of the Law. The matter declares plainly not onely the oppression of Lords upon their Wards, but also the corruption even of the law it selfe, that at the first aimed at the good of the publique, and honour of Knightservice, but now was degenerated into the base desire of profit by making market of the Wards estates and marriages, that brought in strip and wast of Estates, and niggardly neglect of the education and training up of the persons of the Wards and an imbalancing of the generation of mankind and spoile of times. Nor did these times ever espie or provide against the worst of these, but onely endeavoured to save the estate by punishing the wasters in damages by this law, and by forfeiture of the Wardship by a Law made in the time of *Edward* the first; and this as well for waste done during the time of the custody, as in the life time of his ancestors by another law in *Edward* the firsts time. And because the Escheators and their under Officers used to serve themselves out of the estates of minors before they certified to the King his right; and those were not within the Law of *Magna Carta*, or at least not so reputed. It was therefore afterwards provided that these also should render damages in a Writ of waste to be brought against them.

Stat. Gloc.
cap. 5.

Stat. de vasto.
20 E. 1.

Artic. sup. cart.
cap. 18.

The marriage of Wards shall be without disparagement.

cap. 7.

It was an ancient law amongst the Germans and the Saxons brought it hither, and as a Law settled it that marriage must be amongst

Tacitus mor.
Germ.

Mag. carta.

Stat. Merton.
cap. 6.

cap. 7.

West. 1. c. 21.

West 2. cap. 16

cap. 8.

Vide Stat.

Merton cap. 1
& 2.

Prerog. Reg.
cap. 4.

amongst equals; but the Danes and Normans sleighted it, and yet it continued, and was revived. Now as the Lord had the tuition of the Ward instead of the ancessor, so had he the care of the marriage in such manner as the ancessor might have had if he had lived. For in case the Ward were stolne and married, the delinquent suffered fine and imprisonment. Or if the ward married without the Lords consent he shall have the double value, and hold the land over till satisfaction; But in case the Lord marieth the Ward within fourteene yeeres of age to its disparagement, he shall lose his Wardship thereby. And if the Ward refuseth to accept of a marriage tendred by the Lord before her age of 16 yeeres, the Lord shall hold the Lands till he have received the full valew; and in case where one tenant holdeth of divers Lords, the Lords by priority shall have the marriage. These laws were in use during the reignes of those Kings, although it can not be certainly concluded hereby that the wives portion properly belonged to the Lord, as for his own benefit, partly because the female Wards should have no advancement if it belonged to the Lords, and partly because this forfeiture was given to the Lords in nature of a penalty, as appeareth by the frame of the Statute of Merton.

Widdows shall have their Dower, inheritance, their inheritance which they have joyntly with their husbands, their marriage freely, and their Quarentine.

With due regard of the opinion of others I shall proponnd my own. It seemeth to me that the King is within this Law, as well as within the former lawes of the Normans, and those of Henry the second that are of this kind; and as he is within the compasse of every law of this Charter, and that it is called the Grand charter as most immediately comming from the King to the people, and not from the Lords. Nor is there any ground that the Law should intend to give liberty to widdows of Wards belonging to inferiour Lords to marry whom they will; and that onely the Kings widdows shall be bound: Nor did this suite with the contest between the Barons and the King, that their widdows should be bound unto the King, and

and the widdows of their tenants discharged from their tuition; and therefore I conceive by the word *maritagium* is not meant liberty of marriage, but her marriage portion, or *rationabilis pars* according to the foregoing Laws of Henry the first, and Henry the second; and the Saxon customes. But as touching the liberty of marriage it is defined and expressed that the widdows shall not be compelled to marry neverthelesse if they shall marry they must marry with the Lords liking, otherwise he might have an enemy to be his tenant that might instead of homage and service prove traytour, and be his ruine. Lastly touching the widdows dwelling, the law thought it unreasonable that she should immediately after the death of her husband be exposed to be harbourlesse, and therefore ordained that she might continue in her husbands house forty daies, if it were not a Castle, and then she was to have another dwelling assigned to her, because by common intendment she is not supposed to be a person meet to defend a castle: and this was called her *Quarentine*, which I met not with amongst the Saxon laws, and therefore suppose it be of Norman originall.

Mag. carta.

cap. 9.
Glanvil. lib. 7.
cap. 12.

No mans land shall be seised for debt to the King so long as the personall estate will satisfie. Nor shall his pledge be troubled so long as the principall is sufficient, unlesse he refuse to satisfie, and then the pledge shall recover in value.

cap. 10.

The first part hereof was the issue of the law concerning *elegit*, formerly observed in the Saxons times; for the regard of law principally extended unto the person next unto the free hold, and lastly unto the goods. The latter part of this law was the law of pledges or Decenners in the same times; unto which the Reader may resort for further light herein.

The City of London, and other Cities, Burroughs, and Towns; and the Cinqueports, and other ports shall enjoy their ancient liberties.

cap. 11.

The whole Kingdome, and the members thereof herein expressed

M m

pressed

Mag. carta.

Seld. Spicil.
 fo. 192.

pressed had all their liberties saved from the dint of conquest by the law of *VVilliam* the first; upon which, although some of the succeeding Kings did invade, yet none of them made any absolute disseisin, although disturbance in some particulars. But King *Iohn* did not onely confirme them by his grand Charters but by particular Charters to each Corporation, with some enlargements, and in his grand Charter inserted one clause which in the grand Charter of *Henry* the third appeareth not, which thus enlueth, *Et ad habendum commune concilium Regni de auxiliis assidendis aliter quam in tribus casibus predictis*, which if the barbarisme of the Latine mislead me not, is thus in English. And to have right of Common councell, or to be of the Common councell of the Kingdome for the asselling of ayds, other then in three cases afore said, viz. for redemption of their captive King, for Knighting of the Kings sonne, and for his daughters marriage: because these three might be due by the common Law, the two latter by custome, the former by common right, although mentioned from the late disaster of King *Richard*, which King *John* might with shame enough remember, and expect the same measure from the censure of an unquiet conscience. I shall not enter into debate concerning the omission hereof in the later Charters; possibly it might seeme a tautology. Nor concerning the restriction, as if it did imply that the Burgeses had vote onely in cases of generall assessments, but shall leave it to the consideration of the Reader.

cap. 12.

No distresse shall be taken for greater service or other mater then is due.

Glanvil. lib. 2.
 cap. 9.

Distresses are in nature no other then a summons in act of the bringing of a man to answer by seisure of part of his goods; and it was used by the Saxons, as hath been shewed: and because the rich men under colour of seeking their right many times sought for wrong, and though they could not prevail in the issue, yet prevailed so farre as the defendant could not escape without charge and hindrance; therefore the law provided a Writ of remedy against unjust vexation, which *Glan-*

vile

will remembreth us of ; and yet because that remedy also carried with it matter of charge and disturbance to the Plaintiffe, and so the remedy might be worse then the disease ; therefore the Law defined distresses by circumstances of person, matter, time, and place, under penalties of fine and amercement, besides the recompence to the party : First, it must not be taken but by leave from the Kings court, unlesse in case of matters due by common right, and upon complaint made by the plaintiffe. The King sent out a summons in this manner, *Henricus Rex Ang. Hominibus Abbatis de Ramsay salutem. Precipi oquod cito & juste reddatis Abbati Domino vestro quicquid ei debetis in censu & firma & debitis & placitis:quad si nolueritis, ipse vos inde constringat per pecuniam vestram.* And in all cases of matters due by common right, the distresse never was done in an arbitrary way, but by Judiciall act in the Lords Court. Secondly, no distresse for suite shall be made out of the fee, nor against any person, but such as are of that fee. Nor shall any distresse be made in the Kings high way or open street, but by the Kings Officer, and speciall Writ ; because distresse is incident to service, and that is due as from the fee ; and therefore by common right the same must be recovered from the fee, and such as owe service in the same ; but the high way or open street are more properly a franchise belonging to the King, although the soile happily may be the Lords ; and therefore it was an old law that they should be under the Kings safeguard, *Sit pax publica per communes vias* ; and no violence must be there tolerated but by the Kings especiall Writ, which presupposeth the especiall notice taken by the King of the nature of the occasion. A moderation also must be observed in the taking of the distresse ; for it must not be excessive, and also in keeping thereof : for if the owner will he may replevy the same according to the ancient course ; and the Sheriffe must grant replevy if it be demanded, although formerly no replevy was without speciall Writ, and yet they also not alwaies readily obeyed. For the times were such as the Lords were bold with the Kings courts, and Ministers, and refused the order of the law ; now in such cases wherein the matter concerned contempt of the

Mag. carta.

Stat. Marlbr.

cap. 1.

Glanvil. lib. 9.

cap. 1 & 8.

Gloss. 215.

Glanvil. lib. 9.

cap. 8.

Stat. Marlbr.

cap. 2, 3, 4, 15.

Ll. Inx.

Marlb. cap. 21.

Glanvil. lib. 12.

cap. 12.

- Mag. carta.* Kings authority, a fine was set upon the offender: but in case it concerned onely a tort done to the party, he was amerced: the one is called redemption, because the penalty otherwise must lie upon the person, if it be not redeemed by pecuniary fine: the other is called amercement, which is originally a satisfaction unto the party wronged, by recompence out of the personall estate of the delinquent. Thirdly, as touching the matter of the distresse, it must not be of Plough beasts or sheep, unlesse in case of damage feasant, if other distresse may be had; for the Law had a care of such Cattell as were most of publique concernment, and which was the maine stocke of subsistence, so farre as justice would allow: and therefore the unjust taking of any mans Cattaile by any person
- Miror cap. 5. Sec. 3.* whatsoever is liable to the same penalties that unjust distresses are. Fourthly, concerning the using of the distresse, it must not be sold, no not in the Kings case till fifteen daies be past after it is taken; nor must it be carried out of the County, but it must be so impounded as the owner may come to feed it; and it must be discharged if the owner give security of satisfaction before the returne of the Writ. Fifthly, the intent of the distresses must be that which is just, and therefore not for other suit then by the feofment is due, or else by prescription; and in case many are joyntly seised, the suit shall be by one, and the rest shall contribute. Nor must any man be compelled to shew his title to his Land by distresse.
- Distric. Scac. Artic. mag. cart. cap. 12.*
- West. 1. cap. 16.*
- Marlbr. cap. 4. Distric. Scac.*
- Artic. sup. cart. cap. 12.*
- Marlbr. cap. 9. cap. 22.*

cap. 13. *The Common pleas shall be holden in one certain place.*

The Office of Judge of the Common pleas was in my opinion distinct and severall from that of the Crown pleas; not though one and the same man might execute both authorities, doth it therefore follow that it was by one and the same power as if being Judge, he had thereby power in all matters of the Common pleas, and also of the Crown: for though it be true that *Bracton* saith, the King hath one proper court where in are the chiefeest Judges, which both by his own testimony

Capitales Just. nostris

and Britons also did heare and determine causes of all sorts;

yet is it true also that it was by appeale or Writ of error, as in case of false judgement; and that the King had *plures curias*, which doubtlesse had their proper worke: and in the time of Henry the second its cleare that lix were especially assigned for the Common pleas throughout the whole Realme; and yet by another especiall Commission or Letters patents the same men might also have power to determine matters of the Crown, as at this day in their severall circuits. This law therefore doth not as I conceive worke any alteration, but onely in this, that whereas formerly the Judges of Common pleas attended on the Kings Court continually, as all other Judges did; and whither the King removed they did the like, which was a great uncertainty and grievance unto the Commons. Henceforth they are fixed to a certaine place.

Mag. cap. 10.
Marlbr. cap. 20.

Affize of Novel Disseisin and Mortdancester shall be determined in the proper County onely, and by the Justices itinerant sent by the King or his chiefe Justices.

cap. 14.

The law was so declared in Henry the seconds time, and was questionlesse put in practise, so farre forth as with convenience to the Judges might be; but now the convenience of the people is preferred, and they must not be brought up to the Kings Court, but the Justices must come down to them; and yet in case of difficulty the bench where the Common pleas are holden must determine the matter, and where the time in the *Ter* in one County is too scant, the remanets shall be adjourned over to be tried elsewhere in that circuit; which sheweth that the Judges *itinerant* had their time proportioned out to every County. These trials also were so favoured, as in the then holy times of *Advent* and *Septuagesima* or Lent, they might be tried, which although was gained by prayer made by the King to the Bishops, as the words of that law are concluded; yet it shewes that the Parliament had so much light as to hold the time not inherently holy, but meerely sequestred by the will of the Clergy. The Plaintiffs also in *Mortdancester* may be divers, if there be divers heires of one ancestor by one title.

Westm. cap. 5.

Stat. Glouc. c. 6.

And

Mag. carta.
Conjunct. feo.
fat. An. 34.
E. 1.
Stat. Gloc. ca. 1.

And if there be joyntenants, and the Writ be against but one, and the same pleaded, the Writ shall abate; but if joyntnancy be pleaded, and the plea be false, the defendant shall be fined, and imprisoned. And if in the action the verdict be for the plaintiffe he shall recover dammages.

cap. 15.

Darraine presentment shall be taken onely in the common Banke.

West. 2. cap. 30.

Trials in the common bank or other Courts at *Westminster* have ever had an honourable esteem above those in the County by *Nisi prius*, although all be equally availeable. This might be one cause why the Titles of Churches were still retained at the common Bank, whenas all other rode circuit. For that Churches affaires in those times were of high regard: Speed of triall also was not little regarded herein; for Justices by *Nisi prius* properly were but for inquiry till the Statute at *Westm.* the second made them of *Oyer and terminer* in the cases of *Quare impedit* and *Darraine presentment*, and gave them power to give judgement. And thus the Commons gained still in point of conveniency.

cap. 16.

Free men shall be amerced according to the degree of the fault, saving to them their free hold, and to Merchants their maine stocke, and to villaines their Waynage; and Clergy men shall be amerced according to their Lay fee. Barrons shall be amerced by their Peeres, others by the vicinage.

Marlb. cap. 19.

In this regard is to be had first of the persons that are to be amerced, then of the parties by whom, and lastly of the nature and quantity of ameracements. The persons amerced are ranked into foure Classes: Barons, Clergy, Free men, and villaines. But in regard of the parties by whom they are to be amerced, they are but two, Barons and Freemen, for the Clergy villaines and free men are to be amerced by the free men of the neighbourhood. In what Courts these ameracements shall be the Stat. *Marlb.* tells us, not before the *Bisheator*, nor other that make enquiry by Commission or Writ, nor before the Justices

of

of Assize or Oyer and terminer, but only before the chiefe Justices, or Justices *itinerant*. The Statute of *Westminster* addes a fifth Classes of Cities, and Towns, by expresse words, which seems not so necessary, unlesse in pillaging and oppressing times, for they were taken to be within the Statute of *Magna carta*, though not therein named. The rule of the quantity of ameracements is now set down in generall, and left to the discretion of the Peeres or Vicinage, which formerly by the Saxons were specially set down in the law. The rule in generall is with a *ne plus ultra*, viz. not further or more then that the party amerced may spare, and yet hold on in the maintenance of his course, according to his degree. And it must be also according to the quantity of the offence, for the greatest ameracements must not be ranked with the least offences: so as in every degree the maine sustainance of the party is saved: yea the villaines (how ever meane they be) they must have their maintenance. And this sheweth that villaines had a maintenance which was under the protection of the Law, and not under the gripe of their Lords to all intents, unlesse they were the Kings villaines, who it seemeth were meerey under the Kings mercy, as being both their Lord and King, against whom they could hold nothing as properly their own: and therefore in all other cases, even then the villaines were borne under a kinde of liberty, as in the Saxon times formerly hath been declared; which the Law protected against their owne Lords.

No man shall be compelled to make repaire, or maintaine any bridges, banks, or causies, other or otherwise then they were wont to be made, repaired, or maintained in the time of Henry the second.

The limitation to the times of Henry the second, sheweth that his justice was such as maintained the common rights of men; but in the times of Richard the first, and more especially of King John, those rivers, waters, and fishings formerly used in common were incroached upon, inclosed, and appropriated to particular mens uses, which occasioned many bridges, banks,

Mag. carta.

Westm. 1. cap. 6.

*Mirror cap. 5.
sect. 4.*

cap. 17 & 18.

*Mirror cap. 5.
sect. 2.*

Mag. carta. banks, and caufies, to be made and repaired to the great charge of private men, all which are discharged by this Law.

cap. 19.

No Sheriff, Constable, Coroner, or other Bayliff, shall hold any pleas of the Crown.

Li. Hen. 1. c. 8.
Glanv. lib. 1.
cap. 2.

Escheators are also expressed in the old bookes of *Magna carta*, and the abridgements, however it seemeth that its within the intent of the law, which was made to avoyd the extraordinary oppression that these Officers exercised upon the people. For Escheators under colour of inquiry of estates of men would inquire of matters concerning the lives of men, and Sheriffs that had power of trials in cases of theft, as hath been already shewen, abased the same for their own benefit, because in such cases they had the forfeitures. This law therefore takes away such occasions, viz. from the Sheriffs and Coroners and Bayliffs or Justices, (other then by expresse commission thereto assigned) all power to hold pleas of the Crown by triall, leaving unto them neverthelesse power of inquiry, of which anciently they had the right.

cap. 20.

If the Kings tenant dieth supposed in arreare, an inventory shall be made of his stocke by honest men, but it shall not be removed till accounts be cleared; and the overplus shall go to the Executors, saving to the wife and children their reasonable part.

Glanv. lib. 7.
cap. 5.

The first clause hereof was a law in *Henry* the firsts time, and a customary law in *Henry* the seconds time, being a remedy against an old Norman riot of the Lords seizure of the whole personall estate of the party deceased, under colour of a law. The second part concerning the overplus hath this additionall subjoynd in the Charter of King *John*. If any free man die intestate his Chattels shall be divided by his parents and his friends in the presence of the Church, saving to every one their proper debts: and thus since the conquest, the Church men incroached by degrees unto a great power in matters testamentary; I say by degrees; for as yet by this law it appeareth that they were but overseers or eye-witnesses; for as

yet

yet right of ordering or disposing they had none, as may *Meg. carta.*
appeare in that case of a baltard dying without issue and in- *Glanvill. lib. 7.*
testate, the Lord shall have his personall estate: and in all *cap. 16.*
cases the executor had then nothing but bare assets, and the
overplus was assigned between the wife and children accor-
ding to their reasonable part: or if the party died intestate
the next friends did administer, paying the debts and making
dividend of the overplus into the reasonable parts, according
to the ancient Saxon custome still continued: nor doth the
testimony cited out of *Bracton* prove any other then that the *Coke in 1st. 2.*
auncelsthor hath free power to order his estate as he pleaseth, *pag. 33.*
and that the children shall have no more then is left unto
them by their auncelsthor either in his will, or in case of dying
intestate by the custome or law which is and ever was the
rationabilis pars.

No purveyance for any Castle out of the same Town *cap. 11.*
where the Castle is, but present satisfaction must be made:
and if in the same Town, satisfaction must be made with-
in forty daies.

Purveyance was ancient provision for the necessities of the
publique, and so farre was commendable, seeing its not the
common case of all men to regard the publique above their
own private interest; therefore the publique must provide for
it selfe, by their meanes in whom the publique is most con-
cerned: and this was in those elder times, but in two cases,
viz. of Kings and Castles; in the one of which the govern-
ment is principally concerned, in the other the publique de-
fence. For it may be well conjectured that Castles were either
first made in places commodious for habitation, and great
Towns gathered to them for their better safety; or that the
Townes were first gathered in places of commodious habita-
tion, and then Castles were made for their better defence, or
if they were imposed upon them by the victor to keepe them
in awe, they were nevertheless by continuance together be-
come tractable, and conspired for the mutuall defence of each
other. But as touching such Cittadels or Castles that were set

Mag. carta. in solitary places, they may seem rather first intended for the particular defence of some particular man and his family, and neighbouring tenants; and therefore in the purveyance for Castles it seems the proper Town wherein it is, is principally liable to that duty, because their safety is more principally interested; and therefore prizes there taken may be payd at a day to come; but in all other places immediately. Nevertheless this lasted not long, for the souldiers found out a trick of favouring their own quarters, and preserving them in heart against a back winter, knowing that at such times its better to seeke for provision nigh, then to be compelled to seeke far off. But this Stratagem was cut off by the next King, who inhibited all manner of purveyance in any other Town, then in the same Town wherein the Castle is seated. This was a charge that was but temporary, and occasionall: That which was more lasting and burdensome upon the subjects was purveyance for the King, which nevertheless cannot be avoyded, by reason of the greatnesse of his retinue, especially in those daies; and if they should have their resort to the market, the same could not be free to the people, for that the first service must be for the Kings household, and so what scraps will be left for the Commons no man can tell. It was therefore necessary for the Kings family to be maintained by purveyance; and to avoyd the many inconveniences which might and did arise in those spoyling times, It was ordained that it should be felony for any purveyor to purvy without warrant. 2. That none but the Kings purveyor must purvey for the Kings house, and that he must purvey onely for the Kings house; and to purvey no more then is necessary; and to pay for the things they take. And because Kings were oftentimes necessitated for removall from place to place, purveyance of carriage was also allowed: and in case the subjects were grieved either by more purveyance then was necessary, or by non-payment for their commodities so taken, or with composition for the Kings debts, for such purveyance the offenders were lyable to fine and imprisonment. Or if they were grieved by purveyours without warrant, the offender was to be proceeded against, as in case of felony.

Westm. 1. cap. 7.

*Artic. super
cart. cap. 2.*

West. 1. c. 32.

*Artic. super
cart. cap. 2.*

He

He that serveth in Castle-guard is not liable to payment of rent for that service; Nor is he compellable to either, so long as he is in the service in the Army. Mag. carta. cap. 12.

By the ancient custome none but a Knight might be charged with the guard of a Castle belonging to the King, for the letter of this law mentioneth onely such; and therefore to hold by Castle-guard is a tenure in Knight-service: and it seemeth that rent for Castle guard originally was consistent with Knightservice, and that it was not annuall; but promiscuously Knights might either performe the service, or pay rent in lieu thereof; and upon occasion did neither, if the King sent them into the field. And lastly, that a Knight might either doe the service in his own person, or by his Esquire, or another appointed by him thereto.

No Knights nor Lords, nor Church-mens Carriages, nor no mans wood shall be taken against the owners consent; Nor shall any mans Carriages be taken if he will pay the hire limited by the Law. cap. 23.

Churchmen were exempted from charge to the Kings carriages meerely in favour to the Canon which exempted the goods of the Clergy from such lay service; neverthelesse the complaints of the Clergy formerly mentioned shew that this was not duely observed. Knights and Lords were discharged not onely for the maintenance of their port; but more principally because they were publique servants for the defence of the Kingdome in time of warre; and the Kingdome was then equally served by themselves and their equipage, and their carriages, as a necessary assistant thereunto.

The King shall have no more profit of felons Lands then the yeere and a day, and the Lord is to have the remainder. cap. 24.

Anciently the Lords had all the estate of felons being their tenants, and the King had onely the prerogative to waste them as a penalty or part thereof, but afterwards the Lords, by agree-

Inst. 2.

Mag. cart. a.
Bract. lib. 3.
fo. 137.
Prerog. Reg.
cap. 16.

Prerog. Reg.
cap. 14.
Fits. 2 E. 2.
Tit. Escheat.
12.

cap. 25.

ment yeelded unto the King the yeere and a daies prout to save the Lands from spoile; and in continuance of time the King had both the yeere and day, and wasse. Fugitives also were in the same case, viz. such as deserted their Countrey either in time of need, or such as fled from the triall of Law in criminall cases: for in both cases the Saxons accounted them as common felons. Neverthelesse the two customes of *Gloucester* and *Kent* are saved out of this law by the Statute; the first whereof saves the Land to the heire from the Lord, and the second saves the same to the heires males, or for want of such to the heires females, and to the wife her moiety untill she be espoused to another man, unlesse she shall forfeit the same by fornication during her widdowhood. And by the same law also the King had all Escheates of the tenants of Archbishops and Bishops during the vacancy as a perquisite. But Escheats of Land and Tene-ment in Cities or Burroughs the King had them in *jure corona*, of whomsoever they were holden.

All weares shall be destroyed but such as are by the Sea coaste.

The Lieutenant of the Tower of *London* as it seemed claimed a Lordship in the *Thames*, and by vertue thereof had all the weares to his own use, as appeareth by a Charter made to the City of *London* recited in the second institutes upon this Law; and this was to the detriment of the free men, especially of the City of *London* in regard that all free men were to have right of free passage through Rivers as well as through high waies, and purprestures in either were equally noxious to the common liberty; and therefore that which is set down under the example or instance of the rivers of *Thames* and *Medway* contained all the rivers in *England*; albeit that other parts of the Kingdome had not the like present regard as the City of *London* had.

cap. 26.

The Writ of precipe in capite shall not be granted of any free hold, whereby a man may be in danger of losing his Court thereby.

It seemeth that it was one of the oppressions in those times that

that if a suit were commenced in the inferiour or Lords court, *Mag. carta.*
concerning a free hold. A Writ of *precipe in capite* might be
had upon a surmise that the free hold was holden in *capite*,
which might prove an absolute destruction to the inferiour
Court, and was the spoile of the demandants case; and there-
fore I thinke the charter of King *John* instead of the word court
hath the word cause.

*There shall be but one known weight and measure, cap. 27.
and one breadth of Cloathes throughout the Realme of
England.*

This law of weights and measures was anciently established
amongst the Saxons, as formerly hath been shewed and con-
tinued in the Normans times, and confirmed by *Richard* the
first and King *John*. And as touching the measure of the bredth
of Cloaths, although it might seem to abridge the liberty of
particular persons, yet because it was prejudiciall to the com-
mon trade of the Kingdome, it was settled in this manner to
avoid deceit, and to establish a known price of Cloths. And
it seemeth that Wine was ordinarily made in *England* as well as
Ale; otherwise the measures of Wine could not have been esta-
blished by a Law in *England* if they had been altogether made
in other Countries. *Ll. Edgar. c. 8.*

*Inquisition of life and member shall be readily gran- cap. 28.
ted without fees.*

It was a Law of latter originall, made to take away a Nor-
man oppression; for by the Saxon law, as hath been already
noted, no man was imprisoned for crime not baylable) beyond
the next County court or Sheriffs Torne; but when those ru-
rall Courts began to lose their power, and the Kings courts
to devoure trials of that nature, especially by the meanes of
the Justices *itinerant*, which were but rare, and for divers yeeres
many times intermitted, during all which time supposed of-
fenders must lie in prison, which was quite contrary to the
liberty of the freemen amongst the Saxons; it occasioned a
new device to save the common liberty by speciall Writs sued
out.

Mag. carta. out by the party imprisoned or under baile, supposing himselfe circumvented by hatred and malice; and by the same directed to the Sheriffe and others an inquisition was taken and triall made of the offence, whether he deserved losse of life or member; and if it were found for the supposed offender he was bailed till the next comming of the Justices: and for this the Writ was called the Writ of inquisition of life or member; and sometimes the Writ *de odio & atia*. But these inquests were soon become degenerate, and subject to much corruption, and therefore as soon met with a counterchecke from the Law. Or first rather a regulation; for it was ordained that the Inquest should be chosen upon oath; and that two of the inquest at the least should be Knights, and those not interressed in the cause: but yet this could not rectifie the matter, for it seemed so impossible to doe justice and shew mercy this way, that the Writ is at length taken away; and men left to their lot till the comming of Justices *itinerant*. But this could not be indured above seven yeeres; for though the King be a brave fouldier, and prosperous, yet the people overcome him and recover their Writs *de odio & atia* againe.

West 1. cap. 11
Glocest. cap 9.
West, 2. cap. 29.
cap 29.

Lords shall have the Wardships of their Tenants heires, although they hold also of the King in Petit Serjeanty, Soccage, Burgage, or fee Farme.

Glanvil. lib 7.
cap. 9.

Inferiour Lords had the same right of Wardships with the King for their tenures in Knightservice, although their tenants did hold also of the King, unlesse they held of him in Knightservice, which was a service to be done by the tenants own person, or by the person of his Esquire, or other deputy in his stead; but as touching such service as was wont to be done to him by render or serving him with Armes, or other utensiles: this was no Knightservice though such utensiles concerned warre, but was called *Petit Serjeanty*, as in the Lawbookes doth appeare. Neverthelesse Henry the third had usurped Wardships in such cases also and the same amongst others occasioned the Barons wars.

cap. 30.

No judge shall compell a freeman to confesse matter against

against himselfe upon oath without complaint first made *Mag. carta.*
against him. Nor shall receive any complaint without
present proofe.

This law in the originall is set down in another kind of
phrase in the first part thereof, which is obscure by reason there-
of: in expresse words it is thus, No Judge shall compell any
man *ad legem manifestam*; which implieth that the matter
was otherwise obscure if the party that was complained of or
suspected did not manifest the same by his own declaring of
the truth or matter inquired after; and therefore they used in
such cases to put him to oath, and if he denied the matter or
acquitted himselfe, the Judge would sometimes discharge him,
or otherwise put him to his compurgators; and this was called
lex manifesta, or *lex apparens*: and it was a trick first brought
in by the Clergy and the temporall Judges imitated them
therein; and this became a snare and sore burden to the subje. &c.
To avoyd which they complaine of this new kind of triall;
and for remedy of this usurpation, this law reviveth and esta-
blisheth the onely and old way of triall; for *Glanvill* saith,
*Ob infamiam non solet juxta legem terre aliquis per legem apparen-
tiam se purgare, nisi prius convictus fuerit vel confessus in curia*:
and therefore no man ought to be urged upon such difficulties
unlesse by the expresse law of the land. The old way of triall
was first to bring in a complaint and witnesses ready to main-
taine the same; and therefore both appeales and actions then
used to conclude their pleas with the names of witnesses sub-
joyned, which at this day is implied in those generall words
in their conclusions, *Et inde producit sectam suam*, that is, he
brings his sect or suite, or such as doe follow, or affirme his
complaint, as an other part also is implied in those words *Et
hoc paratus est verificare*. For if the plaintiffs sect or suit of wit-
nesses did not fully prove the matter in fact the defendants
averment was made good by his own oath, and the oathes of
twelve men, and so the triall was concluded.

Bracton. fo. 106.

*Seld. super
Hengham.*

No free men shall be imprisoned or disseised of his *cap. 31.*
free-

Mag. carta. hold or liberties, outlawed or banished or invaded, but by the Law of the Land, and judgement of his Peeres. Nor shall justice be sold, delayed or denied.

Its a comprehensive law, and made up of many Saxon laws; or rather an inforcement of all laws, and a remedy against oppression, past, present, and to come; and concerneth first the person, then his livelihood, as touching the person; his life and his liberty; his life shall be under the protection of the law, and his liberty likewise, so as he shall be shut into no place by imprisonment, nor out of any place by banishment, but shall have liberty of ingresse and egress. His estate both reall and personall shall also be under the protection of the Law, and the law also shall be free, neither denied nor delayed. I thinke it needlesse to shew how this was no new law; but a confirmation of the old, and reparation added thereto; being much impaired by stormy times; for the summe of all the foregoing discourse tendeth thereto.

cap. 32.

Merchants shall have free and safe passage and trade without unjust taxes, as by ancient custome they ought. In time of warre such as are of the enemies Countries shall be secured till it appeare how the English Merchants are used in their Countries.

That this was an ancient law the words thereof shew, besides what may be observed out of the Laws of *Ætheldred* and other Saxon laws. So as it appeareth that not onely the English freemen and natives had their liberties asserted by the law, but also forrainers if Merchants, had the like liberties for their persons and goods, concerning trade, and maintenance of the same; and were hereby enabled to enjoy their own under the protection of the law, as the free men had. And unto this law the charter of King *John* added this ensuing.

It shall be lawfull for every free man to passe freely to and from this Kingdome, saving fealty to the King, unlesse in time of warre; and then also for a short space, as maybe for the common good, excepting prisoners, outlaws, and those
Country

Countrey-men that are in enmity, and Merchants who shall *Mag. carta.*
be dealt with as aforesaid.

And it seemeth that this law of free passage out of the King-
dome was not anciently fundamentall, but onely grounded
upon reason of State, although the free men have liberty of
free passage within the Kingdome according to that originall
law, *sit pax publica per communes vias*; and for that cause, as I
suppose, it was wholly omitted in the Charter of Henry the
third; as was also another law concerning the Jewes, which
because it left an influence behind it (after the Jewes were ex-
tinct in this Nation) and which continueth even unto this day,
I shall incert it in this short summe.

*After death of the Jewes debtor no usury shall be payd during the
minority of the heire, though the debt shall come into the Kings hand.
And the debt shall be payd, saving to the wife her dower and main-
tenance for the children, according to the quantity of the debtors
Land, and saving the Lords service; and in like manner of debts to
others.*

The whole doctrine of usury fell under the title of Jewes;
for it seemeth it was their trade, and their proper trade hither-
to. It was first that I met with forbidden at a Legatine Coun-
cill nigh 300 yeeres before the Normans times; but by the
Confessors law it was made penall to Christians, to the for-
feiture of estate, and banishing; and therefore the Jewes and
all their substance were holden to be in nature of the Kings
villeines, as touching their estate, for they could get nothing
but was at his mercy; and Kings did suffer them to continue
this trade for their own benefit, yet they did regulate it as
touching infants, as by this law of King John, and the Sta-
tute at Merton doth appeare; but Henry the third did not put
it into his Charter as I thinke, because it was no liberty of
the subjects but rather a prejudice thereto; and therefore Ed-
ward the first wholly tooke it away by a Statute made in his
time, and thereby abolished the Jewes.

*Tenants Lands holden of Lands escheated to the King
shall hold by the same services as formerly.*

Concil. Brit.
299.

Ibid. 623.
Glanvil. lib. 7.
cap. 16.

M. Paris
An. 1229.
Merton. cap. 5.
Stat. de Judais.
An 18 E. 1.

cap. 33.

Mag. carta.
cap. 34.

In all alienations of Lands sufficient shall be left for the Lords distresse.

Prerog. Reg.
cap. 7.

20 ass. pl. 17.

18 Edw. 1.
Westm. 3. ca. 1.

Submitting to the judgement of the learned I conceive that as well in the Saxon times as untill this law, any tenant might alien onely part of his lands, and reserve the services to the alienor, because he could not reserve service (upon such alienation) unto the Lord paramount, other then was formerly due to him, without the Lords consent, and for the same reason could they not alien the whole tenancy, to binde the Lord without his expresse licence saving the opinion in the booke of Assizes, because no tenant could be inforced upon any Lord, least he might be his enemy. Neverthelesse it seemeth that *de facto* tenants did usually alien their whole tenancy; and although they could not thereby barre the Lords right, yet because the Lord could not in such case have the distresse of his own tenant, this law saved so much from alienation, as might serve for security of the Lords distresse. But tenants were not thus satisfied; the Lords would not part with their tenants, although the tenants necessity was never so urgent upon them to sell their Lands; and therefore at length they prevailed by the Statute of *Quia emptores* to have power to sell all, saving to the Lords their services formerly due; and thus the Lords were necessitated to grant licences of alienation to such as the tenants could provide to buy their lands. Nor was this so prejudiciall to the Lords in those daies when the publique quiet was settled, as it would have been in former times of warre, whenas the Lords right was maintained more by might and the ayd of his tenants, then by law, which then was of little power.

cap. 35.

The 35 Chapter I have formerly mentioned in the Chapter concerning the Clergy.

cap. 36.

No man shall be appealed by a woman for the death of any but her own husband.

The right of appeale is grounded upon the greatestt interest. Now because the wives interest seemeth wholly to be swallowed

up in her husband; therefore she shall have an appeale of the death of him onely; and such also was the Law in *Glanvils* time. How far this point of interest shall extend to the degrees of consanguinity the Norman Law formerly hath shewen. And against whom appeales did lie the Statute at *Westminster* tells us, viz. not onely against the principall, but also against accessories; yet not against them till the principall be attainted. And because it was ordinary for men of nought to appeale others in a malicious way, it was by another law established that if the party appealed was acquitted the appellant should not onely render dammages, but be imprisoned for a yeere.

Mag. carta.

West. 1. cap. 14

Westm. 2. ca. 13

The County court shall be holden at the wonted time. cap. 36.

The Torne shall be holden at the accustomed place twice in the yeere, viz. after Easter and Michaelmas.

The view of Frankpledges shall be holden at Michaelmas
The Sheriffe shall not extort.

The Sheriffs Courts had now lost somewhat of their jurisdiction, though for time and place they are confirmed *statu quo*; to the end that through uncertainty thereof the suiter might not make defaults, and be amerced; yet they lost much of their respect within the compasse of these few yeeres by two laws, the one of which made at *Merton* allowed all suiters to the rurall Courts to appeare by proxy or attorney, which it seemeth had power to vote for the masters in all cases publique and private; and did not onely themselves grow into parties and maintenance of quarrels, and so spoiled these Courts of their common Justice, but rendred the freemen ignorant and carelesse of the common good of the Country, and given over to their own private interest. And though the corruption of justice was soon felt, and against it a law was provided, viz. that the Sheriffe should not allow of such corrupt attornies; yet this was no cure to the free men, who were still suffered to wax wanton at home, albeit that they were discharged from doing their suite in all other hundreds but that wherein they dwell. The second law that tooke away much honour from these Courts was that law at *Marl-*

Merton. cap. 10

West. 1. c. 33

Marlbr. cap. 10.

Ibid.

Mag. carta. bridge that discharged the Baronage of England, and the Clergy from their attendance at such service, and this also opened the doore wider to oppression, for where greatnesse is it carieth therewith honour from the meaner sort, and a kinde of awe and stop unto the minds of such men that otherwise would riot without restraint; and though it might also be said that the pretence of great men in such Courts would oversway the meaner, and make strong parties; yet it must also be acknowledged that these parties being greater are the fewer, and doe not so generally corrupt all sorts as the corruption of the meaner sort doe; its said by the wise man, where the poore oppresse the poore its like a raging raine that leaves no food. The last branch in this Law is an inhibition to the Sheriffs from extortion; and surely there was great need, and much more need then ever now that the Lords and Clergy are absent. It was thought that the great occasion of the Sheriffs oppression was from above, I meane from the King that raised the vallews of the farme of Counties granted to the Sheriffs, (for in those daies Shieriffs gave no accounts, as of later times they have done) and therefore the Charter of King *Iohn* between the 17 and 18 chapter inserteth this clause *Omnes commitat & Hundred Wapentag & Trethingi sint ad antiquas firmas absque ullo incremento exceptis Dominicis Maneriis nostris.* But this did not worke the worke, although it tooke away occasion, for the humour was fed from within, and turned to a fore upon that place that could never be cured to this day. Nor could the wisdom of times finde other helpe to keepe the same from growing mortall, but by scanting the diet, and taking away that power and jurisdiction which formerly it enjoyed.

Artic. super
 cart. cap. 13, 14.
 Stat. de vice-
 com. An. 9 E. 2

cap. 37.

The 37 Chapter hath been already noted in the Chapter of the Clergy next foregoing.

cap. 38.

Escuage shall be taxed as was wont in the time of Henry the second.

The Charter of King *Iohn* hath superadded hereunto this ensuing provision. There shall be no Escuage set in the Kingdome,

doms, except for the redeeming of the Kings person, making of his eldest sonne a Knight, and one marriage of his eldest daughter; and for this there shall be onely reasonable ayd. And in like manner shall the ayds of the City of London be set. And for the asselling of Escuage we will summon the Archbishops, Bishops, Abbots, Earles, and greater Barons of the Kingdome, specially by our severall Writs, and will cause to be summoned in generall by our Sheriffs and Bayliffs all other our tenants in *capite* to be at a certaine day after forty daies at the least, and at a certaine place; and we will set down the cause in all our Writs. And the matter at the day appointed shall proceed according to the counsell of those that shall be present, although all that were summoned doe not come. And we will not allow any man to take ayd of his free men, unlesse for redemption of his body, and making his eldest sonne a Knight, and one marriage for his eldest daughter; and this shall be a reasonable ayd onely.

Mag. carta.

M. Paris

M Paris

An. 1214, 1215

25 Edw. 1.

cap. 6.

34 Edw. 1.

cap. 1.

West. 1. cap. 36.

Thus farre the Charter of King *John* concerning this point of taxe or assessment; and if the History saith true the Charter of *Henry* the third was one and the same with that of King *John* then either this was not left out in *Henry* the thirds Charter, in that Historians time; or if it was omitted in the originall it was supposed to be included in the generall words of the Law, as being accustomed in times past; and then these particulars will be emergent: First, that the ayds and Escuage in *Henry* the firsts time were assessed by the same way with that in this Charter of King *John*; for that all the quarrell between the Lords and King *John* was concerning the charter of *Henry* the first, which the Lords sware to maintaine. Secondly, that neither ayds nor escuage were granted, or legally taken, but by Act of Parliament, although the rate of them was settled by common custome, according to the quantity of their fee. Thirdly, that some Parliaments in those times as concerning such matters consisted onely of such men as were concerned by way of such charge, by reason of their tenancy, for escuage only concerned the tenants by Knights service; and therefore those onely were summoned unto such Parliaments as onely concerned

Mag. carta.

Hoveden 445.

Gloss. tit.
Baron.

cerned Escuage; nor had the City of London nor the Burgeses right to vote in such cases, it is said p. 258. And thus the Forrest laws that were made in the time of Ri. 1. were made by the consent of Archbishops, Bishops, Abbots, Earls, Barons, and Knights of the whole Kingdome; for what the great men gained they gained for themselves and their tenants. And the truth is, that in those times although publique damage concerned all, yet it was ordinary for Kings to make a shew of summoning Parliaments, when as properly they were but Parliamentary meetings of some such Lords, Clergy, and others, as the King saw moit convenient to drive on his own designe, and therefore we finde that Henry the third about the latter part of his reigne, when his government grew towards the dregs, he having in the Kingdome two hundred and fifty Baronies he summoned unto one of these Parliamentary meetings, but five and twenty Barons, and one hundred and fifty of his Clergy. Nevertheless the law of King John was still the same, and we cannot rightly read the law in such presidents as are rather the birth of will then reason. Fourthly, that no ayds were then granted, but such as passed under the title Escuage, or according there unto; for the words are, *No Escuage shall be demanded, or granted, or taken, but for redeeming the Kings person, Knighting of his sonne, or marriage of his daughter.* Nor is the way of assessing in these times different, saving that instead of all the knights, two onely are now chosen in every County; the tenure (as it seemeth) first giving the title of that order, and both tenure and order now changed into that title taken up for the time and occasion. Fifthly, that it was then the ancient custome, and so used in the time of Henry the first; that the advice of those then present was the advice of the whole, and that their advice passed for a law without contradiction, or notwithstanding the Kings negative voice; for the words are *The matter at that day shall proceed according to the counsell of those that shall be present, although all doe not come;* and therefore that clause in the Kings oath *quas vulgus eligerit* may well be understood in the future, and not in the pretence. Last of all, though not gathered from the text of this law, whereof we treat,

trear, yet being coincident with the matter it is observable that though the Clergy were now in their ruffle, and felt themselves in their full strength; yet there befell a posture of state that discovered to the world that the English held not the interest of the Clergy to be of such publique concernment, or necessary concurrence in the government of the Kingdome, as was pretended. For the Clergy finding assessments of the Laity so heavy, and that occasions of publique charge were like to multiply daily, they therefore to save the maine stocke procured an inhibition from *Rome* against all such impositions from the Laity, and against such payments by the Clergy; and in the strength of this they absolutely refused to subm't to ayd *Edward* the first by any such way, although all the Parliament had thereunto consented. And thus having divided themselves from the Parliament, they were by them devided from it; and not onely outed of all priviledge of Parliament, but of all the priviledge of subjects, into the state of *præmuniri*: and thus set them up for a monument to future times, for them also to act without the consent of those men, as occasion should offer. But *Henry* 3^d. not satisfied with this ancient and ordinary way of assessment upon ordinary occasions, tooke up that extraordinary course of assessment upon all the free men of the Kingdome, which was formerly taken up onely in that extraordinary occasion of redeeming of the Kings or Lords person out of captivity, and common defence of the land from piracy; and under the title of *Daneguelt*, which was now absolutely dead, and hanged up in chains as a monument of oppression. Neverthelesse it cannot be denied but that in former times the free men were as deeply taxed, if not oppressed with payments to their Lords at such times as they were charged over to the King in the cases aforesaid, as by the latter words of the law aforesaid of King *John* doth appeare, and whereby its probable that the inferiour Lords were gainers. The conclusion of the Charter of *Henry* the third (the same suiting also with the third observation foregoing) doth not a little favour the same; for its expresly set down that in lieu of the Kings confirmation of the Charter of liberties aforesaid not onely

Mag. carta.

Walsing.
An. 1297.

Mag. carta.

onely the Archbilhops, Bilhops, Abbots, Priors, Earles, Barons, and Knights, but also the free men, and all the Kingdome gave a fifteenth of all their moveables.

M. Paris
An. 1227.

And thus have I summed up and compared both the copies of the grand Charters of *Englands* liberties (saving two particulars inserted into the Forest laws of *Henry* the third, wherein if any thing had been new and unreasonable King *John* might have colour to except against them as extorted by force, and *Henry* the third might (as he was advised) plead nonage, and so they might have been choked in their birth; but being all *consuetudines*, as in the conclusion they are called; and Kings ashamed to depend upon such frivolous exceptions, it may be wondred what might move them to adventure so much bloodshed, and themselves into so many troubles to avoyd their own acts, unlesse the writing of them were an obligation acknowledged before the world; and they resolving secretly to be under none were loath to publish the same to all men. Its a strange vanity in great men to pretend love to justice, and yet not indure to be bound thereto, when as we see that God himselfe loves to be bound by his word, and to have it pleaded, because he delights as much to be acknowledged true in performing, as good in promising. But neither was King *John* or *Henry* the third of this spirit; faine they would undoe, but could not. Its true it was at the first but a Kings charter of confirmation, and had Kings been patient therewith it might have grown no bigger; but by opposition it rooted deeper and grew up unto the stature of a Statute, and settled so fast as it can never be voided but by surrender from the whole body.

Marlbr. cap. 5.

Having thus summed up the liberties of the subjects and free men of *England* under this Charter, I shall make some appendix hereunto by annexing a few additional in these times established; and although they come not within the letter of the Grand charter, yet are they subservient thereunto. And first concerning the King; and this either as he is King, or as he is Lord. As King he had these prerogatives above all Lords.

Prerog. Reg.
cap. 9.

The King shall have the custody of fooles and ideots lands

lands for their maintenance, and shall render the same to their heires.

And concerning mad-men and lunaticks, the King ^{cap. 10.} shall provide a Bayliffe for their maintenance, rendring account to them when they are sober, or to their administrators.

It is no lesse liberty or priviledge of the people that fooles and mad persons are to be ordered by tutors then children, and therefore this may be annexed to the rest of the liberties as well as the other. Neverthelesse it seemeth that the Laws tooke them into their regard in respect of their estates, which might be abused to the prejudice of the publique, rather then out of respect had to their persons. Now because there is a difference between the disability of these persons, the one being perpetuall the other temporary; therefore is there also by these laws a difference in the disposall of their estates; for the tutor had a right in the disposing of the one, and but a bare authority or power in providing for the other. Secondly, the person of the tutor is to be considered: Anciently it was the next kindred, grounded as I conceive, upon the naturall affection going along with the blood; and this so continued in custome untill these times: for though the *Mirror of Justices* saith, that Henry the first brought in that course of giving the custody of these disabled persons to the King, as hath been formerly observed, yet *Bracton* that wrote long after the time of Henry the first, speaking of these kind of persons saith, *Talibus de necessitate dandus est tutor vel curator*; not so much as mentioning the King in the case. And in another place, speaking of such as are *alieni juris* saith, that some are under the custody of their Lords, and others under their parents and friends. But let the time of the entrance of this law be never so uncertaine, its now a declared law, that the King in such cases is the common curator or tutor of all such persons, as he is a chiefe Justice, rendring to every one his right.

Bract. lib. 5.
cap. 10.

Lib. 1. cap. 10.

Prerog. Reg.
cap. 12.
West. 1. cap. 4.

The King shall have the wrecks of the Sea.

What shall be called a wreck the Statute at Westm. 1. declar-

eth

reth, viz. where the ship so perissheth that nothing therein escapeth alive; and these are rather in their originall committed to the King as a curator, then given him as a proprietor, although that custome hath since setled a kind of right, which may perhaps be accounted rather a title by estoppel. For the fundamentall ground is, that the right owner cannot be manifested, and therefore the King shall hold it; and if the right owner can be manifested the King shall hold it till the owner doth appeare.

Marlb. cap. 17. *The heire in Socage tenure shall have an action of waste, and an accompt against his guardian for the profits of his lands and mariage.*

Bracton, lib. 2. cap. 37. The heire in Socage being under age shall also be under custody of such guardian of the next kindred, who cannot challenge right of inheritance in such lands so holden, as if the Lands descended from the father side, the mother, or next of the kindred of the mothers side shall have the custody; and so if the Lands descend from the mother, the father or next kindred of the fathers side shall have the custody. And this custody bringeth with it an authority or power onely, and no right, as in case of the heire in Knightservice; and therefore cannot be granted over as the wardship in Knightservice might, but the guardian in Socage remaineth accomptant to the heire for all profits both of land and marriage. The full age of tenant in Socage is such age wherein he is able to doe that service, which is 14 yeeres, for at such age he may be able by common repute to ayd in tillage of the ground, which is his proper service. But the sonne of a Burgesse hath no set time of full age, but at such time as he can tell money, and measure cloath, and such worke as concerne that calling.

Merton, cap. 1. *Widdows desforced of their Dower of Quarentine shall by action recover damages till they recover their Dower.*
cap. 2. *They shall also have power to divise their crop arising from her Dower.*

Bract. lib. 2. cap. 40. It was used that the heire should have the crop with the Land

Land, but this Statute altered that former usage, and yet saved the Lords liberty to distraine if any services were due.

Writs de consimili casu granted in cases that fall under the same Law and need the same remedy, and such Writs shall be made by agreement of the Clerks in the Chancery, and advice of such as are skilfull in the Law. WeR.2. cap. 14.

It was none of the meanest liberties of the freemen of England that no Writs did issue forth against them, but such as were anciently in use, and agreed upon in Parliament. And it was no lesse a grievance and just cause of complaint, that Kings used to send Writs of new impression to execute the dictates of their own wils, and not of the Laws of the Kingdome, as the complaints of the Clergy in the times of Henry the third doth witnesse. Nevertheless because many mens cases befell not directly within the Letter of any Law for remedy, and yet were very burdensome, for want of remedy its provided by this Law that in such emergent cases that doe befall within the inconvenience, shall likewise be comprehended within the remedy of that law.

M. Paris addit.
Artic. 44.

Aide to make the sonne of the Lord a Knight, and to marry his eldest daughter shall be assessed after the rate of twenty shillings for a Knights fee, and twenty shillings for twenty pounds in yeerely value of Soccage tenure. West. 1. c. 36.

The uncertainties of ayds are by this Law reduced and settled as touching the summe, and thereby delivered the people from much oppression, which they suffered formerly. Nor was onely the particular summe hereby, but also the age of the sonne when he was to be made a Knight, viz. at the age of fifteen yeeres; too soon for him to performe Knightservice, but not too soone for the Lord to get his money. And the daughter likewise was allowed to be fit for marriage at seven yeeres of age, or at least to give her consent thereto, albeit that in truth she was neither fit for the one or other: and therefore it must be the Lords gaine that made the Law, and it was not amisse to have the ayd beforehand, though the

marriage succeeded not for many yeeres after; and if the Lord died in the interim the executors having assets paid it, or otherwise his heire.

CHAP. LXVIII.

Of Courts, and their proceedings.

BESIDES the Courts of Justices *itinerant*, which were ancient, as hath been said, other Courts have been raised of latter birth, albeit even they also have been of ancient constitution; and divers of them *itinerant* also, and some of them settled in one place. The worke of the Justices *itinerant* was universall, comprehending both matters of the Crown and Common-pleas. That of *oyer* and *terminer* is onely of Crown pleas originally commenced, and inquired of by themselves, and granted forth upon emergent crimes of important consequence that require speedy regard and reformation. Justices of Gaol-delivery have a more large worke, that is, to deliver the Gaols of all criminall offenders formerly indicted or before themselves. Justices of Assize and *Nisi prius* are to have cognisance of Common pleas onely, and for the most part are but for inquiry. All which saving the Justices *itinerant* in ancient use were instituted about these times, and therewith ended both the worke and common use of the ancient *iters*; and yet all these later courts joyntly considered have not the like comprehensive power that the *iters* had, for they had the power of hearing and determiniug all causes, both of the Crown and Common-pleas; albeit in a different manner; that is to say, in the first times promiscuously united into one and the same person; but soon after the Norman times, and more clearly in the time of Henry the second that power was divided into severall persons, some sitting upon the Common pleas, others upon the Crown pleas: The Judges of these journeying courts were specially assigned by the King, as in the case of the Gaol-delivery

delivery or settled by the Law upon the Judges of both benches at *Westminster*, as in case of *oyer and terminer*, and of the Assizes or *Nisi prius*, saving that in the last case they were associated with Knights in the Counties for the taking of Assizes. Westm. 2. ca. 19
Ibid. c. 30.

Now concerning the Courts that were settled: some were settled or annexed to the Kings personall residence, as the Chancellours Court; for in these times it began to have a judiciary power of eminent stature, and growing out of the decayes of the great chiefe Justice of *England*. Then also the Kings bench was annexed by the same Law unto the Kings Court or personall residence, 'as it anciently ever had that honour; although it seems the endeavours were to make it like the Common pleas in that particular. Another and last court that was settled in this manner was the Marshalls court, which in the originall onely concerned the Kings household, but afterwards compassed in a distance of the neighbouring places, because the Kings attendants were many in those times; when as the Courts of justice continually attended on his person: and this precinct was called the Vierge; and all cases of debt and covenant, where both parties were of the Household, and of trespasses *vi & armis* where one of them was of the household were handled in the court of the Verge, or the Marshalls court. And inquests of death within the same shall be taken by the Coroner of the County, with the Coroner of the household. Other Courts were rurall, and affixed also to some certaine place, either of the County or Town, or other particular place. That of the County suffered in these times great diminution, even almost to destruction by a Law restraining the power thereof onely to trespasses of 40 s. value or under; for though formerly the Kings justices incroached upon the County courts and contracted suits before themselves, which by the ancient law they ought not; yet it was ever illegall, and the County courts held their right till this law was made, which kept under those inferiour Courts, and made them of lesse account then formerly. Neverthelesse the Kings *Justices* or Writ to the Sheriffs oftentimes inableth the inferiour Court

Fleta.
Artic. sup. cart.
cap. 15.

§ E. 4 fo. 119.

Artic. sup.
cart. cap. 5.

Stat. Gouc.
cap. 8.

to

to have cognisance of cases of greater value. Lastly, a rule was set to the smaller Courts of Corporations, Faires, and Markets, viz. that no person should be sued in any of them, which was not a debtor or pledge there.

CHAP. LXIX.

Of Coroners, Sheriffs, and Crown pleas.

Coroners.

Westm. I. ca. 10

Coroners shall be chosen in the county from the wisest, greatest, and chiefe men of the country.

Of these Officers formerly hath been spoken, as touching their election, qualification, and worke: this Law brought in no change of any former Law, but onely of a former custome gained by these degenerating times, which brought men into place that were farre unfit, who otherwise of poore and mean condition maintained themselves by bribery and extortion, and being found guilty had not sufficient to give recompence. This law therefore revives the first law and hold these men to their worke of taking inquests and appeals by indenture between themselves and the Sheriff, and these were to be certified at the next comming of the Justices.

Sheriffs.

Artic. sup.

cart. cap. 9.

The Free holders in every county if they will shall elect their own Sheriff, unlesse the Sheriffwicke be holden in fee.

Mirror cap. 1.

Sec. 3.

Stat. de vic.

9 E. 2.

This was indeed the ancient custome: as the Officers of the Kingdome were eligible by the Common-councell of the Kingdome, so were also the Officers of the County, chosen by the County. But within a few yeeres in the time of Edward the second comes another law; that the Sheriffs shall be appointed by the Chancellor, Treasurer, Barons of the Exchequer, and the Justices, which Law was made in favour of the people, as by the file of that Statute doth more fully appeare: for though at the first blush it may seem a priviledge lost by the

the free men, that these great men should have the election of the Sheriff; yet it proved a great advantage to the common quiet of the people in those times of parties, and was so apprehended: Otherwise as the case stood in those daies of Edward the second, it was no time for him to gaine upon the peoples liberties. Nor had the Statute of *Articuli super cartas*, whereof we now treat been penned with these words, if they will; and questionlesse in these daies we now live in: if the people had but a little taste of this seeming liberty of electing Sheriffs in the County court, as formerly it was used, it would be soon perceived that the election of these chiefe Officers were better disposed in some other hand if rightly pursued.

Homicide by misfortune shall not be adjudged murder. Chancemedly.
Marlbr. cap. 25.

That the Saxons made difference between homicide by misfortune, and that which was done *felleo animo*, or with a spirit of gall, formerly hath been shewed; now what it was that altered the case I cannot say, unlesse the violence, cruelty, and oppression of the times: formerly all kind of manslaughter was finable, I mean in the Norman times, and so might more rationally be ranked into one degree; but now the punishment began to change from forfeiture of estate and losse of member, to death and forfeiture of estate; and therefore it was more necessary to make the difference in the penalty, seeing in the fine formerly a difference was observed; and this difference to assert by a Law that might limit the invenomed spirits of the Judges of those daies.

Robbery punished with death.

Robbery.

This crime hitherto was punished by fine and losse of member at the utmost but is now made capitall, & punished with death. One example whereof, and the first that story maketh mention of we finde of an Irish Nobleman in the daies of Henry the third, who suffered death for piracy; and it was a law that then, though rigorous, yet seasonably was contrived to retard the beginnings and hasten the conclusion of a civill warre in a Nation

Nation who value their estates and liberties above their owne lives.

Rape.

West. 1. cap. 13.

Rape upon the complaint of the party violated, made within forty daies, shall have right. If the delinquent be convicted without such complaint made he shall be fined and imprisoned.

Before this Law this crime was but finable unlesse the fact was committed upon a virgin, for then the member was lost. And this was the Saxons Law; but the Normans inflicted the losse of the member upon all delinquents in any rape. Nor was this made felony by any law or custome that I can finde, till about these daies. Its true that *Canutus* punished it *capiti estimatione*, by way of compensation, which rather gives a rule of damages to the party wronged then importeth a punishment inflicted for an offence done against the Crown, as if it were thereby made capitall. But for the more certainty of the penalty, another law provideth that if the rape be committed without the womans consent subsequent she may have an appeale of Rape. And though a consent be subsequent, yet the delinquent upon indictment found shall suffer death, as in the case of appeale. But if a wife be carried away with the goods of her husband, besides action of the party the King shall have a fine. If the wife elopeth she shall lose her Dower, if she be not reconciled before her husbands death. All which now recited provisoes are comprehended together in one chapter, and yet the Chapter is *partee per fess* French and Latine: so farre thereof as concerneth death was written in French, being the most known language to the great men in generall, many of whom were French, by reason of the interest that Henry the third had with France in his late warres against the Barons. It was therefore published by way of caveat, that no person that understood French might plead ignorance of the law that concerned their lives. The residue of that Chapter was written in Latine, as all the other Laws of that Parliament were, upon grounds formerly in this discourse noted. One proviso more remaineth, which is also comprehended in the

the same Chapter with the former, viz. Any person that shall carry away a Nunne from her house shall suffer imprisonment for three yeeres, and render dammages to the house. This crime was formerly onely inwombd in the Canon law, and now borne and brought forth into the condition of a Statute law, rather to vindicate the right of the free men, then in any respect had to the Clergy, who had been very bold with the liberty of the free men in this matter; for Archbishop *Peckham* not a yeere before the making of this law for this offence had excommunicated Sir *Osborne Gifford*, nor could he get absolution but upon his penance: first he was displed with rods three times, once in the open Church at *Wilton*, then in the market-place at *Shaftsbury*, and lastly in the publique Church there; then he must fast divers moneths. Lastly, he must be disrobed of all Military habiliments, viz. Guilt Spurs, Sword, Saddell, golden Trappings, and to use no brave garments, but russet, with Lambe and Sheepe skins; to use no shirt, nor take up his order againe untill he had spent three yeeres pilgrimage in the Holy land: and unto this penance the Knight by oath bound himselfe. A strange power, and to repress which, it was time for the people to looke about them, and rather to punish delinquents themselves, then to leave it to the will of such men as never had enough.

Antiq. Brit.
fo. 197.

Concealment or neglect of apprehending of felons, punished by fine and imprisonment.

Concealment
of Felons.
West. 1. cap. 9. 4

In those ancient times pursuits of felons with hui and cry were made by Lords of mannors, Bailiffs of liberties, Sheriffs, and Coroners, whereas now they are made by Constables. See more in the Chapter of peace. Escapes also were punished with fine and imprisonment: and in some places the Lord had the fine, in other places the Sheriff, and in some cases the King; yet it in no case was any fine assessed or taken till the triall before the Justices.

West. 1. cap. 3.

Persons defamed for felony, not submitting to triall by Law, shall be committed to close and hard imprisonment.

Defamed
Felons.
West. 1. cap. 1

Miror cap. 1.
sect. 9.

Briton cap. 4.
sect. 24.

Glanvil. lib. 10
cap. 1.

It hath been accounted an extreame construction of this law, and questionlesse so it is, that this Law should warrant that punishment of pressing to death which hath been of later times more constantly used then former times ever knew of; for though it be granted that some trick of torture was sometimes used, even before the Norman times, and so might now and then leave some few examples after the Norman times, yet did the law never patronise such courses, especially if the death of the party suspected ensued thereupon, but accounted it manslaughter. And the end of this law was not to put a man to death, but to urge him to confesse; and so Briton saith, such as will not submit to triall shall be put to penance till he shall pray to be admitted thereunto; and therefore the penance then used was such as did not necessarily inferre death; nor was it a finall judgement in the triall, but onely a meanes thereto: and therefore it might rather consist in deniall of conveniences then inflicting of paine. Now in what cases it was used may be understood from the manner of the indictments in those daies, whereof (besides appeales by the party) some were of particular fact done; others onely of a fame: and it may be conceived that the course in the second was, that if a man would not submit, but would stand mute, he was put to this kind of imprisonment for the discovering law was by Henry the third taken away. But if the delinquent was positively accused of a felony, and thereupon indicted by a witnesse of the fact, and then the delinquent would not submit to his triall by law, in such case the finall judgement was to die *Onore, fame, &c.* because in the one there was a fact affirmed against him by a witnesse, and in the other onely a fame or suspicion, which is not pregnant against the life of a man. But this manner of indictment being now laid aside, and all proceedings being upon a fact affirmed against the party, I conceive this law of no use at all in these daies.

Bayle.

West. 1. cap. 15.

Baile shall not be allowed to Out-laws fore-jured, Thieves taken in the act, notorious Thieves, appealed persons, burners of houses, breakers of prison; false coiners,

ners, counterfeiters of the Broad-seale, prisoners upon excommunication, open malefactors, and Traitors against the King.

The six first are in nature of persons attainted either upon their own confession, or such manifest evidence as in common reason cannot be gainsayd; all which were before this law under baile; yea the last of all, although the most heynous of all was in the same condition. As touching breakers of prison, in these times it was felony, for what cause soever they were committed; and therefore their imprisonment was without baile, for who so makes no conscience of breaking the prison, his credit will little avale: yet it must be acknowledged that the Law imprisoned few, without baile in those foregoing times, but in case of felony or execution; but afterwards the cases of commitment being ordinary, even in matters of mean processe, and because mens credits waxing weake by the weaknesse of their estates now wasted by the civil wars; there fore in Edward the seconds time a law was made to restrain the felony in such cases, onely to the breach of prison by such as were committed for felony. And as touching imprisonment upon excommunication, its manifest that within five yeeres before the making of this law it was complained that such were set at liberty by the Kings Writ *de homine replegnando* without the Bishops consent. But now the Clergy had gotten the day of the Law, which did much decline from that guard of imprisonment, but hated perpetual imprisonment. Nor was this complaint grounded upon any other law then that of the Canon, for the common law ever held the supream cognisance of Excommunication within its own power, as upon the Writ *de quare excommunicato* may appeare. Other crimes are yet also by this law allowed baile, such as are persons indicted of larceny before Sheriffs, &c. persons imprisoned upon slight grounds Receivers, and Accessories before felony, Trespassers, persons appealed by provers after the death of the approvers. If baile be granted otherwise, then the law alloweth the party that alloweth the same, shal be fined imprisoned, render dammages, or

Glanvil. lib. 14.
cap. 1.

Addit. M Paris.

forfeit his place as the case shall require. And thus the iniquity of the times was so great as it even forced the subjects to forgoe that which was in account a great liberty to stop the course of a growing mischief.

*Spreaders of
false news.*
West. 1. cap. 34.

Publishers of false news whereby discord or slander may arise between the King and his people, shall be imprisoned till they produce the relator.

33 Edw. 1.

It is therefore an offence against the Crown to procure or maintaine an ill conceipt in the King of the people, or an ill conceipt in the people of the King; and its as well an offence against the Crown for the King to conceive ill of his people, as for them of him. But all must be grounded upon falshood; for truth respects no mans parson: & all men are equally bound by that woe, if they call good evill, or evill good; although difference must be made in the manner of representation. And upon this ground of maintaining strife was a law made also against conspiracy to make or maintaine indictment, suit, or quarrell, and it was likewise finable.

Merton. cap. 3.

Redisseisors and postdisseisors found upon verdict before the Sheriff, Coroners, and Knights shall be imprisoned.

Marlbr. cap. 8.

Formerly redisseisin was under no other Law then that of disseisin, but by this law made a matter belonging to the Crown, and tried before the same Judges that had the power of inquiry of all offences against the Crown. The penalty of imprisonment in this case was to be without baile, but onely by the Kings Writ *de homine replegiando*; and yet even thus the penalty was not sufficient to restraine the offence, and therefore a law was made to abridge the power of that Writ, as touching such offender, and they became irremediable as touching their liberty by that Writ, besides that upon recovery had against them they lost double dammages.

West. 2. cap. 26.

*Trespassers
upon Parks.*
West. 1. cap. 20.

Trespassers in Parks and Fishponds convicted within a yeere and a day shall render dammages, suffer imprisonment for three yeeres, and give security of good behaviour

viour for time to come. If any beasts be taken in a felonious manner he shall be proceeded against as a robber.

From the times of King *Steven* the Lords and great men endeavoured to advance their power and greatnesse so high above the meaner sort of free men, as they made Kings continually jealous of their power. Castles had been a bone of long contention between them, but they being for the most part taken away the strife was about prisons and power to imprison offenders; and that also after much opposition they layd aside: yet the violence of these times being such, as (though felonies were somewhat dreaded) trespasses of the highest nature were little regarded, such as were riotous hunting in their Parks, and fishing in their waters. The Lords and great men made it their last request that at least in such cases they might have power to imprison such as they found so trespassing; but this was also denied them, though by *Henry* the third in his first time, when as yet the government was not worsted by projects of arbitray power or corrupt counsels of forrainers, nor himsele a man able to sway with the Lords in matters that were of doubtfull prerogative. And to speake indifferently its better for the liberty of the subject, that the power of imprisonment should be regulated onely by the Kings Writ ordered by law, then by the warrants of great men, especially in their own cases; and therefore in this matter the Kings prerogative was a patron to the freemens liberty. Nevertheless these great men give not thus over their game, for though in times of publique calamities little place is left for pleasure to any man; yet when times are grown to more quiet, pleasure revives, and the great men renew their motion; and though they could not obtaine prisons to their own use, as they endeavoured at the meeting at *Merton*; yet now they obtaine the Kings prisons to the use of a Law that was as good as their own, and thereby satisfied their own displeasure for the losse of their pleasure. And yet this law sufficed them not, but they obtaine a further priviledge, that such persons as are found so trespassing, and refusing to submit, may be killed without perill of felony.

Merton cap. 11.

An. 21. Edw. 1.

CHAP. LXX.

Of the Militia during these Kings reignes.

THe Souldiery of *England* may be considered first in regard of the persons. Secondly, their armes. Thirdly, their service. The persons were as formerly, not onely such as were milites or tenants in Knight service, but also such as served at the plow; and concerning them both it is to be considered what the law made by *Edward* the second holdeth forth.

Stat. de Milit.
1 E. 2.

All such as ought to be Knights and are not, shall be distrained to undertake the weapons of Knighthood, if they shew not cause to the contrary.

Regularly all tenants by Knightservice ought to be Knights, but *de facto* were not; so as in these times there was a further worke to make a man a Knight then his bare tenure; for such onely were *milites facti*, who had both Lands sufficient to maintaine the Armes and state of a Knight; and also a body fit to undertake the service in his own person, and whereof he had given sufficient prooffe in the field. Others that had Land either had not sufficient maintenance or not habiliments of person, and as not expected were laid aside; of this sort were many by reason of the late civill warres, in which they had much impaired both their bodies and estates. This rendred the strength of the Kingdome and Militia so much decayed, and the minds of men so weared that they began to love ease before the times would brooke it, and a cessation from Arme before they had any mind to peace. The Parliament espied the danger, & how necessary it was for the people to be well armed in these times of generall broile; and upon that ground allowed this law to passe, that all such as had Lands worth 20 li. yearly besides reprisals should be ready not to be Knights (nor under the favour of others is there any ancient president to warrant it)

it) but to finde or to enter the field with the Armes of a Knight, or provide some able person to serve in their stead unlesse they were under 21 yeeres of age, and so not grown up to full strength of body; nor their lands in their own possession, but in custody of their Lords or guardians. Neverthelesse of such as were grown to full age, yet were maimed impotent, or of meane estate, and tenants by service of a Knight, it was had into a way of moderation, and ordered that such should pay a reasonable fine for respit of such service; nor further as concerning their persons were they bound. But as touching such that were under present onely, and not perpetuall disabilities of body upon them incumbent, as often as occasion called they served by their deputies or servants: all which was groundded not onely upon the law of *Henry* the second, but also upon common right of tenure.

The armes that these men were to finde are said to be those belonging to a Knight, which were partly for defence and partly for offence; of the first sort were the Shield, the Helmet, the Hauberk or Brestplate or coate of maile: Of the second sort were the Sword and Lance; And unto all a horse must be provided: These Armes especially the defensive have been formerly under alteration, for the Brestplate could not be worne with the coate of maile, and therefore must be used as occasion was provided of either; and for this cause the service of a Knight is called by severall names; sometimes from the horse, sometimes from the Lance, sometimes from the Helmet, and not seldome from the coat of maile.

The power of immediate command or calling forth the Knights to their service in its own nature was but ministeriall and subservient to that power that ordered warre to be leaved: and therefore as in the first Saxon government under their Princes in *Germany*, so after under their Kings, warre was never resolved upon, but if it were defensive, it was by the counsell of Lords; if offensive, by the generall vote of the grand Councell of the Kingdome; so by vertue of such order either from the Councell of Lords or grand Councell the Knights were called forth to warre, and others as the case required summoned

Tacitur.

moned to a rendezvous; and this instrumentall power regularly rested in the Lords, to whom such service was due; and the inferiour Lords were summoned by the Lord Paramount, as chief of the fee of which their tenants were holden, and not as King or chiefe Captaine in the field; for they were not raised by Proclamation, but by summons issued forth to the Sheriffe, with distresse; and this onely against such as were within his own fee, and held of the Crown. The King therefore might have many Knights at his command, but the Lords more, and if those Lords failed in their due correspondency with the King, all those of the inferiour orbe were carried away after them, so the King is left to shift for himselfe as well as he can; and this might be occasioned not onely from their tenures by which they stood obliged to the inferiour Lords, but probably much more by their popularity which was more prevalent by how much Kings looked upon the Commons at a further distance in those daies, then in after times, when the Commons interposed intently in the publique government. And thus the Horsemen of *England* becomming lesse constant in adhering to their Sovereigne in the field, occasioned Kings to betake themselves to their foot, and to forme the strength of their battels wholly in them, and themselves on foot to engage with them.

One point of liberty these Souldiers by tenure had, which made their service not altogether servile, and that was that their service in the field was neither indefinite nor infinite, but circumscribed by place, time, and end. The time of their service for the continuance of it was for a set time, if it were at their own charges: and although some had a shorter time, yet the generall sort were restrained to forty daies. For the courage of those times consisted not in wearying and wasting the Souldier in the field by delays, and long worke in wheeling about, and retiring, but in playing their prizes like two combatants of resolution to get victory by valour, or to die. If upon extraordinary occasions the warre continued longer, then the tenant served upon the pay of the common purse. The end of the service of the Tenants (*viz.* their Lords defence in the

the defence of the Kingdom) stinted their work within certain bounds of place, beyond which they were not to be drawn, unlesse of their own accord: and these were the borders of the Dominion of the Crown of *England*, which in those daies extended into *Scotland* on the North, and into a great part of *France* on the South. And therefore the Earle Marshall of *England* (being by *Edw. 1.* commanded by vertue of his tenure to attend in person upon the Standart under his Lieutenant that then was to be sent into *Flanders*, which was no part of the Dominion of *England*) refused; and notwithstanding the Kings threats to hang him, yet he persisted saying *he would neither goe nor hang*. Not onely because the tenants by Knight service are bound to the defence of their Lords persons and not of their Lieutenants; but principally because they are to serve for the safety and defence of the Kingdom; and therefore ought not to be drawn into forraine Countries. Nor did the Earle marshall onely this, but many others also both Knights and Knights fellows, having twenty pounds *per annum*; for all these with their armes were summoned to serve under the Kings pay in *Flanders*. I say multitudes of them refused to serve, and afterwards joyned with the rest of the Commons in a Petition to the King, and complained of that summons, as of a common grievance, because that neither they nor their ancestors were bound to serve the King in that Countrey, and they obtained the Kings discharge under his broad Seale accordingly. The like whereunto may be warranted out of the very words of the Statute of Mortmaine, which was made within the compasse of these times, by which it was provided that in case Lands be aliened contrary to that Statute, and the immediate Lords doe not seise the same, the King shall seise them, and dispose them for the defence of the Kinodome, *viz.* upon such services reserved as shall suite therewith, as if all the service of a Knight must conduce thereto; and that he is no further bound to any service of his Lord then will consist with the safety of the Kingdom. This was the doctrine that the sad experience of the later government of Kings in these times, had taught the Knighthood of *England* to hold for the future ages.

Wal. sing. fo. 69.
& 71.

Stat. Mortm.
7 Edw. 1.

*Stat. de
Militibus.*

No tenant in ancient demesnes, or in Burgage, shall be distrained for the service of a Knight.

Clerks and tenants in Socage of other Manors then of the King shall be used as they have been formerly.

Tenants in ancient Demesne and tenants in Burgage are absolutely acquitted from forraine service; the one because they are in nature of the Kings husbandmen, and served him and his family with victuall: the other because by their tenure they were bound to the defence of their burrough, which in account is a limbe or member of the Kingdome, and so in nature of a Castle guard. Now as touching Clerks and tenants in Socage holding of a subject they are left to the order of ancient use appearing upon record. As concerning the Clergy, its evident by what hath been formerly noted, that though they were importunate to be discharged of the service military, in regard that their profession was for peace, and not for blood, yet could never obtaine their desire; for though their persons might challenge exemption from that worke, yet their Lands were bound to finde armes by their deputies, for otherwise it had been unreasonable that so great a part of the Kingdome as the Clergy then had should sit still and looke on, whiles by the law of nature every one is engaged in his own defence. Nor yet did the profession of these men to be men for peace hold alwaies uniforme; some kind of warres then were holden sacred, and wherein they not onely adventured their estates, but even their own persons; and these not onely in defensive way, but by way of invasion, and many times where no need was for them to appeare. Tenants in Socage also in regard of their service might plead exemption from the warres: For if not, the plough must stand still, and the land thereby become poore and lean: Neverthelesse a generall service of defence of the Kingdome is imposed upon all, and husbandmen must be souldiers, when the debate is who shall have the Land; in such cases therefore they are *evocati ad arma* to maintaine and defend the Kingdome, but not compellable to forraine service, as the Knights were whose service consisted much

much in defence of their Lords person in reference to the defence of the Kingdome: and many times policy of warre drew the Lords into Armes abroad to keepe the enemy further from their borders, and the Knights then under their Lords pay went along with them; and therefore the service of Knight-hood is commonly called *servitium forinsecum*. Of these So-cagers did arise not onely the body of English Footmen in their Armies, but the better and more wealthy sort of them found armies of a Knight, as formerly hath been observed, yet alwaies under the pay of the common purse; and if called out of the Kingdome they were meere voluntiers; for they were not called out by distresse as Knights were, because they held not their Land by such service; but they were summoned by Proclamation, and probably were mustered by the high Constables in each Hundred, the Law neverthelesse remaining still intire, that all must be done not onely *ad fidem Domini Regis*, but also *Regni*; which was disputed and concluded by the Sword: for though Kings pretended danger to the pub-lique, often times to raise the people; yet the people would give credit as they pleased: or if the Kings title were in ques-tion, or the peoples liberty, yet every man tooke liberty to side with that party that liked him best; nor did the Kings pro-clamation sway much this or that way.

Concil. Brit.
406

Its true that presidents of those times cry up the Kings power of arraying all ships and men without respect, unlesse of age or corporall disability: but it will appeare that no such array was but in time of no lesse known danger from abroad to the Kingdome then imminent, and therefore might be wrought more from the generall feare of the enemy, then from the Kings command; and yet those times were alwaies armed in neigh-bouring Nations, and Kings might have pretended continuall cause of arraying. Secondly, it will no lesse clearly appeare, that Kings used no such course but in case of generall danger to the whole Kingdome, either from forraine invasion, as in the times of King *John*; or from intestine broiles, as in the times of *Henry* the third, and the two *Edwards* successively: and if the danger threatned onely one coast, the array was

21 E. 1. rot. 81.

23 E. 1. Memb.
5.

limited onely to the parts adjacent thereunto. Thirdly, it seemeth that generall arrayes were not levied by distresse till the time of *Edward* the first, and then onely for the rendezvouz at the next Sea coast; and for defence against forraine invasion, in which case all subjects of the Kingdome are concerned by generall service: otherwise it can come unto no other account then that title prerogative, and therein be characterized as a tricke above the ordinary straine. Fourthly, those times brought forth no generall array of all persons between the ages of sixteen yeeres and sixty, that was made by distresse in any case of civill warre, but onely by Sheriffs Summons; and in case of disobedience by summons to appeare before the King and his Councell; which sheweth that by the common law they were not compellable or punishable. Lastly, though these arraies of men were sometimes at the charge of the King, and sometimes at the subjects own charge, yet that last was out of the rode way of the Subjects liberty, as the subsequent times doe fully manifest. And the like may be said of arraies of ships, which however under command of Kings for publique service, were neverthelesse rigged and payed out of the publique charge. The summe of all will be, that in cases of defence from forraine invasion Kings had power of array according to the order of Law; if they exceeded that rule, it may be more rightly said they did what they would, then what they ought.

CHAP. LXXI.

Of the Peace.

WArre and peace are two births by severall venters, and may like the day and night succeed, but can never inherit each to other; and for that cause they may claime to belong to one father, and that one and the same power should act in both; and yet its no good maxime that he that is the chiefe

chiefe Commander in warre ought to be the chiefe in the order of peace. For it naturally befalls that warre, especially that which we call civill warre, like some diseases in the body does rather breed ill humours then consume them, and these must be purged by dieting the State, and constant course of justice, unto which the rugged waves of warre have little or no affinity if not enmity: Neverthelesse the wisdom of our ancestors thought it most meet to keep their Kings in worke as well in time of peace as of war; and therefore as they anciently referred the principall care thereof to the Lords, who together with certaine select persons in every County did administer justice in severall *iters* or circuits: so when Kings had once gotten the name of being chief in civill affaires as they had it in martiall; they soon left the Lords behind them (who also were willing enough with their own ease) and had the name of doing all notwithstanding it was done by advice of the Lords, and directory of Ministers or commissioners thereto deputed. And thus that peace which formerly passed under the titles of *Pax Domini*, *pax vice comitis*, it is *pax Regni*, became by eminency swallowed up in that which was called the Kings peace, and the Justices called the Kings Justices, and himself flattered into that title of Fountaine of Justice, which belongeth onely to him that is The Most High, or Chiefe Law-giver.

The manner how this honourable care of the safety and peace of the Kingdome was imployed, may be referred to a double consideration, the one in execution of justice upon delinquents, the other in preventing occasions of offence or delinquency, by meanes whereof the publique peace might be endangered. The first was acted diversly according to the present sence of affaires: for what was at first done by the Princes in their circuits, with one hundred of the Commons called *Comites*, and that done *per pagos vicesque* was afterwards done by *itinerant* Judges sent from the King for the greatest matters, and by Lords in their Leets, Governours, or chiefe Magistrates of Towns in their courts, and Sheriffs in their Tournes, as *judices statim* for the ease of the people in matters of lesse moment. I say I conceive it was in the Torne, for I suppose

Tacitus

52 Hen. 3.
Marlb. cap. 25.

Miror cap. 2.
Sec. 9.

Mag. cart.
cap. 19.

Glocest. cap. 8.
West. 1. cap. 3.

Stat. Wint.
13 Edw. 1.

Coke Inst. 4.
p. 176

suppose no emergent court taken up upon occasion could by the Law draw a necessity of a sudden appearance of all above twelve yeeres of age at the same, and for the same cause it seemeth that one certaine Torne every yeere was holden for inquiries of homicide, unto which all above twelve yeere of age were to come except Barons, Clergy, and women, or otherwise all such had been bound to attendance on every Torne. Nevertheless the worke of the Tornos continued not to heare and determine as anciently they had done. For in *Henry* the thirds time, and formerly, divers men had prisons to their owne use, some as Palatines, other as Lords of Franchise, and others by power and usurpation, and had the benefit of all fines incident; and by this meanes many were fined that deserved it not, and some also that deserved worse: to prevent which evill *Henry* the third tooke away that power of holding Crown-pleas. And *Edward* the first tooke away their power to determine escapes, and left them onely the power of inquiry, and to certifie at the next comming of the Justices.

But these injurious times had holden too long to be forgotten, or laid aside by such coole pursuit. Men were still ordinarily imprisoned, and so continued oftentimes, till the comming of the Justices *itinerant*. For whereas in case of bloodshed the Writ *de odio & gratia* was a remedy; the other had no remedy but by procuring a Commission of *Oyer and terminer*, which ordinarily was a cure worse then the hurt. As a remedy hereof *Edward* the first found out the new way of making Justices of peace, as may appeare by the Statute at *Winton*, which law being purposedly made for the conserving of the peace, providing for penalty of crimes already committed (as well as for the suppressing of future) ordaineth that offences against that Law shall be presented to Justices assigned to enquire thereof; and though these at the first might be *itinerant*, yet it soone made way to resiant. And before that Statute it seemeth the King had found out the way, if that note be true which is left revived into memory by that honourable reporter, which relating to the sixth yeere of *Edward* the first saith, that then *prima fuit institutio justiciariorum pro pace conservanda*. And yet some semblance

semblance there is that it was yet more ancient, even in the time of Hen. 1. if I mistake not the sence of that clause in his laws concerning vagabonds; he ordereth that they shall be carried *Iusticie que preest*, although the language be not so Clerkly as to speake the sence out. Now though their worke as yet was but in triall, and they were onely trusted with power of inquiry, yet it induced a new way wherein the Sheriffe was not so much as intrusted to intermeddle, and which not onely intermitted the course of his proceedings in such matters, but also led the way to the dispoiling of the Sheriffs Torne, and Lords Leets, of that little remainder that was left them of judicatory power in matters that were against the peace, and made their inquisitory power lesse regardfull; and eased the Justices *itinerant* of much of their work in regard they were speedily to certifie up to the King, and so these matters should be determined in Parliament, according as those Justices were elected in Parliament, who as it seemes were jealous of giving the power of determining those offences into any sudden hand. To summe up then the first part as touching the punishment of offences against the peace, the wheele is now in the turning, the Leets and Törnes begin to be slighted, the labour of the Justices *itinerant* lessened, the Commissions of *Oyer and terminer* disused by the bringing in of a new order of Justices for the peace especially appointed. And the Parliament as the supreme providors, left as the reserve for the asserting and maintenance of the same, albeit that under it the power of determining, much rested upon Justices or Judges that attended the Kings court, after that the Common pleas were settled and confined to a certain place.

Hen. 1. cap. 58.

The preserving of the peace for the future consisted in preventing and suppressing riots, routs, unlawfull assemblies, and in apprehending and securing of such as were actors and contrivers of such designs, and other malefactors. And herein we are to consider, 1. The Laws. 2. The meanes. 3. The executive power. Concerning the first there is no question to be made but that the power of making Laws for the maintenance of the peace rested in the Parliament, although endeavour
pos-

possibly might be used to settle the same in the sole order of the Kings own person ; and therefore we finde not onely the assize of Armes, but generally the substance of the Statute at *Winton* to be formerly taken up by Proclamation by Kings, predecessors to *Edward* the second who first that I can finde put the same into the force of a law by Parliament, finding by experience that Proclamations may declare the Kings mind, but not command the peoples wils, although peradventure the thing enjoyned was of ancient use, and little inferiour to custome, or Common law. Such are the distempers of civill broiles that bring up peace in the reare as a reserve when their owne strength is wated, rather then out of any naturall inclination thereto. A brieve recollection of the laws thus ensues,

Stat Wint.
13 Edw. 1.
cap. 1.

In case of Robbery or felony committed, and the delinquent be not forth coming or discovered, the County or Hundred shall answer the dammages.

Of this more may appeare from the Norman and Saxon laws: the intent appeareth by the law it selfe to stirre up the people to use all meanes by pursuit with hui and cry, and making inquisitions of the fact with all speed, in Townships, Hundreds, Franchises, and Counties.

cap. 2.

Persons suspected shall not be entertained or harboured by any inhabitant, unlesse He will undertake for him.

cap. 3.

Of this also formerly both in the Norman and Saxon laws. *Walled Towns shall keepe their gates shut from Sunne set to Sunne rising. The like observed in Cities, Burroughs, and Townes, from the feast of Ascention to Michaelmas.*

The power of the watch was great: it might apprehend any passenger, and stay him all night; and if he be a suspected person he is to be committed to the Sheriffe; and if an escape be made, the party is to be pursued with hui and cry. These two last Chapters were in effect in *Henry* the thirds time in course
by

by way of the Kings command by Writ in the 36 and 37 yeeres of his reigne, with some more particulars concerning the same.

M. Paris in
 Addit. & post.
 Adversar.
 cap. 4.

High waies through every Lordship shall be kept cleare on each side by the space of 200 foot from hedges, ditches, Bushes, and underwood.

High waies herein intended are such as are from one Market Town to another, and in such were alwaies preserved the publique peace or safety, for the maintenance of commerce, and freedom of traffique, which is of such publique concernment that it hath been of very ancient institution.

Every man between the age of fifteen yeeres and forty shall maintain Armes in his house, according to the ancient Assize for the preserving of the peace.

cap. 5.

This Chapter brings into consideration the second thing propounded, viz. the meanes of preserving of the peace, which are two: First, by maintaining Armes. 2. By certifying defaults. In the first is to be considered the persons that are to be assessed; 2. The Armes; 3. The end. The persons to be assessed to Armes are indefinitely set down, and comprehend all sorts, as well bond as free, and others; for such are the expressions in the Commission of Henry the third. But by the Assize of Henry the second none were to be armed but free men, and they worth sixteen or ten Marks in goods at the least: yet their ages are limited; by this Law they must be between fifteen yeeres and forty; but by the Commission in Henry the thirds time all between fifteen and sixty yeeres of age were to be armed. King John arrayed all sorts, free, bond, and all others that have Armes: or ought to have or can carry Armes; and it seems by what hath been formerly noted, that those that were younger then their tenure would beare them out, were accepted into service if they would offer themselves; but by these courses they though under one and twenty yeeres of age were not onely accepted, but compelled to warre. Under this title we may also touch upon the persons that were the instruments to array these men, or rather to arme them; and

36 Hen. 3.
 M. Paris post
 adversaria.
 Hoveden.

M. Paris
 Anno 1213.

Hoveden.
 Hen. 3.
 M. Paris addit.

M. Paris. post.
adversaria.

M. Paris
Anno 1253.
& 1256.

M. Paris
An. 1253.

Ll. Gulielm.
50.

Ll. Æthelst.
616.

these were Justices *itinerant*, or one or more Commissioners, such as the King found most meet for the service; and unto these were Commissions with instructions sent; and sometimes Writs were directed onely to the Sheriffs to take with them twelve Knights of the County, and to goe into every Hundred and call before them all such persons as by the law ought to be assessed at Armes, and to cause them to be sworn to finde and maintaine Armes in such manner as by the Law they then should be, or formerly were assessed; and sometimes the establishment of Armes were set down in those Writs, and sometimes published by Proclamation. For Kings found all means little enough to prevaile to bring in alteration of Armes, and of their service, which was a thing not onely troublesome but chargeable, and whereunto they could not easily prevaile to bring the freemen to consent; and therefore sometimes the indeavours of Kings in such cases did not onely meet *dilationem*, but also *deletionem*, as the Historians words are, untill the way was found out to declare an establishment by Parliament, by this Statute made at *Winton*.

Now for the nature of the establishment we are to consider that the people of *England* were distinguished according to their tenures, into such as held by Knightservice, and such as held by Soccage; and that none but those being freeholders could be charged to finde armes according as by the Lawes of the Norman Conquerour may appeare. The establishment of Armes for the Knights were established by their tenures in certainty, and therefore no need was either of assessment or oath to tie them to finde such Armes; but all the difficulty was for such as were not bound by other tenure then as free born subjects, all of whom doe owe to their Country defence and so questionlesse had liberty to provide themselves of such armes as were by common and constant use held most advantageous against the common enemy, and for the publique defence. And that these were put in certainty may appeare by the Law of King *VWilliam* formerly noted, and by some instances in the Saxon Laws anciently used; amongst others that Law of *Æthelstane*, that for every plough every man should finde

finde two compleat horses. And another order of *Æsbeldred* nigh 80 yeeres after differing from it assessed upou every eight hides of Land a Helmet and a coate of Maile; and the Hiltorian tels us that a Hide is a plough land, or so much land as one plough can keepe in tilthe one whole yeere; and the reliefe of the Noblemen of all sorts and ranks in Horses, Helmets, coates of Maile, Lances, Shields, and Swords, the meanest of all which degrees being called *Mediocris Ttainus*, yeelding a reliefe equall to the Armes of a Knight in the times whereof we now treat, viz. one Horse, one Helmet, one coate of Maile, one Lance, one Shield, one Sword; all comprehended under *arma sua*, as if he had a certaine proper Armes; and the Laws concerning the forfeiture of Armes doe in effect affirme the thing, viz. that all men were armed; yet probable it is that Laws were not then so often made for the inforcing this or that particular sort of Armes, in regard that till the Normans time this Island was troubled, but seldome with any enemies from forraigne parts that brought any new sorts of weapons into fashion, the Danes and Norwegians being no other then an old acquaintance of theirs. Neither were the Saxons as yet tamed by any enemy so farre as to begge a peace, albeit that the Danes had gotten them under. But after the Norman times the English being somewhat overmatched in warre inclined more to Husbandry, and began to lay aside their regard of Armes; and this occasioned the Kings to make assessments of Armes; yet having regard to the ancient course of the Saxons, saving that they urged the use of the Bow more then formerly was used, and thereby taught the conquered to conquer the Conquerours in future ages. Of these sorts of assessments before this Statute at *Winton* I finde but two; the first made by *Henry* the second, and the other by *Henry* the third, which together with that of this Statute I parallell thus together in their own words.

Huntington.
An. 1008.
Li. Canut. 97.

| Hen. 2. | Hen. 3. | | Stat. VVint. |
|---|---|--|--|
| | Lands | Goods | |
| Knights fee | 15 Librat | 60 Marks | 15 li. land. 40 marks goods. |
| Loricam Cassidem Clipeum Lanceam | Loricam Capellum ferri Gladium Cultellum Equum | Loricam Capellum ferri Gladium Cultellum Equum | Hauberk Shapell de fer Espee Cotell Cbivall. |
| 16 Marks } chatels rents | 10 Librat | 40 Marks. | 10 li. lands 20 marks goods |
| Halbergellum Capelletum ferri Lanceam | Halburgettum Capellum ferri Gladium Cultellum | Halbertum Capellū ferreum Gladium Cultellum | Hauberk Shapell de ferr Espee Cotell |
| 10 marks } chatels rents | 100 s. | 20 marks | 100 s. land |
| VVanbais Capelletum ferri Lanceam | Purpundum Capellū ferreum Gladium Lanceam Cultellum | Purpundum Capellū ferreum Gladium Cultellum | Purpoint Shapell de ferr Espee Cotell |
| | Betwixt 5 l. & 40 s. | 9 Marks. | Betwixt 5 l. & 40 s. |
| | Gladium Cultellum Arcum & sagit. | Gladium Arcum & sagit. Cultellum | Espee Arke & setes Cotels |
| | under 40 s. | under 9 marks to 40 s. | under 40 s. |
| | Falces Gisarmas Cultellos, &c. | Falces Gisarmas &c. | Faulx Gisarmes Cotells |
| | | | under 20 marks goods |
| | | | Espees Cotels. |

I have thus impaled these three that the Reader may the better discern how they relate each to other, and so may the better understand the matter in the summe. And I must explaine three or foure words in them as they are set down, before I can bring up the conclusion, because the mistake of the sense of the words hath made some mistake the intent of the thing, and force the same to an unwarrantable issue. *Lorica* signifies that piece of Armour that defends the breast or forepart of the body, and sometimes is made of plates of Iron, of which sort I conceive those of the old Germans were (whereof the Historian maketh mention, *paucos lorica* he saith the Germans had few Armes of defence of their foreparts, and fewer Helmets or Headpieces) for otherwise if they had Iron defences for their heads they would not have been content with defences made of Lether for their foreparts, as in the first rude times they might have been: Sometimes its made of links of Iron, and commonly is called a coate of Maile; but I conceive it cannot be so meant in the assessments of *Henry* the second and *Henry* the third, because that those of the second degree are said that they ought to keep *Haubergettum*, or *Halburgellum*, or *Haubertum*; all which are but severall dialects of one name, and are taken for a coate of Maile: and therefore by the diversity of names in one and the same assessment I doe conclude that the Armour was not of one and the same fashion. But its evident that by *Hauberk* in the assessment of the Statute at *Wint.* is meant a coate of Maile, and is never taken for a Brest-plate or Gorget, as hath been taken upon trust by some that build more weighty conclusions upon that weake principle, then its able to beare; and for the truth hereof, as the word is a French word, so I appeale to all French Authors, and shall not trouble the reader with the notation of the word, or further about the meaning thereof. In the last place, as great mistake is that also of the word *Shapell de ferr*, which is taken by some to betoken a brest-plate of Iron. For the truth whereof the Reader may consider the Latine word *Capellum* or *Capelletum*, and he shall finde that it is an Iron cap, or an ordinary Head-piece: and in the Assize of *Henry* the third it holds

Lipsius de m.
lit. Rom. lib. 5.
Dialog. 6.

Tacitus.

Cluer. Germ.
p. 339-34.

holds the place of *Cassis* in the Assize of *Henry* the second; for the manner of all these let the Reader view the sculptures of the severall Norman Kings armed for the charge in the beginning of their severall reignes, as they are represented in *Speeds* History. It may also be conceived that there is as much mistake of that weapon which is called *cullellum* or cotell, whiles they translate it by the word Knife, for though it be true that it is one signification of that word, yet it appears not onely by this law that it was a weapon for a Knight in warre, but in use at Torniaments, as by that Statute that forbids the use of a pointed Sword, or pointed Cottell, a Battuone, or a Mace, at that sport: and therefore it may seem to be some weapon of greater use, either a Cotellax or such like weapon; otherwise to enioyn the finding of a Knife to a man as an offensive weapon against armed men in battell would serve to no use at all.

Now concerning the difference between the severall Assizes aforesaid, it consisteth either in the number of the severall degrees or rankes of those that are assessed: or secondly, in the manner of their valuation: or lastly, in the particulars of their armes assessed upon them. As touching the degrees in *Henry* the seconds time, they were but three, in regard that he onely assessed free-holders; and certainly that was the ancient Law, as by the law of the Conquerour and other Saxon laws formerly mentioned may appeare. But *Henry* the third taking example of King *Inbr* who was the first founder of generall arrayes charged all but such as were men of nothing; albeit I finde not that such as were of the inferiour degree were sworn to those Armes, but rather allowed to have them. And though the Statute at *Winchester* holdeth to the same degrees in Lands, yet in the valew of goods there is some difference in favour of them that onely have stocke, and no freehold. Secondly, there is some difference in the manner of valuation of Lands with Chattels; and therein the Statute at *Winton* favours the personall estates more then *Hen. 3.* and he more then *Hen. 2.* and yet all of them pretend one rule of ancient custome; I believe they mean that they had it in their eye, but not in their heart: for they would come as nigh to it as they could, and yet keep

as farre from it as they durst. Thirdly, as touching the difference of the Armes between these three assessments, it seems so small as in this they are most of all one. For wherein *Hen. 2.* leads, both *Hen. 3.* and *Edw. 1.* doe imitate, saving that they adde the Horse and Sword, which questionlesse was to be understood as a granted case, that the compleat Armes of a man could not be carried and mannaged without a Horse, nor defended without a Sword. As touching other alterations, it might be done upon good advice, as not being deemed meet that such as were no Knights but in estate, should be armed in every respect like as the Knights were. And thus we have an ancient custome of maintaining Armes by every free man, for the defence of the Kingdome, first made uncertaine by the avarice of Kings and negligence of the free men, and brought into an arbitrary charge; at length reduced to a certainty upon all sorts of inhabitants by a Statute law (if so it then were) unto which every man had yeelded himselfe bound by his own consent. But to what end is all this? I said it was for the defence of the Kingdom, and so it was in the originall; and yet also for the safety of the King in order thereunto, and for the safety and maintenance of the peace of every member of the whole body. This in one lumpe thus will not down with some who will have this assessment onely to be for keeping of the peace against routs and riots, but not sufficient nor intended to be supply for warre, when *Edward* the first calls for it, because *Edward* the first shall not have his power confined within the compasse of a Statute, but to be at liberty of array as he should think meet; and its not to be denied but the words of this Law runne thus, *viz.* That the intent thereof is for preserving of the peace; but those generall words will not beare the power of a restrictive fence, for certainly the peace is as well preserved by providing against warre as against riots; and against forraine warre as intestine mutinies: and that the Statute intended the one as well as the other will appeare, because it was made in relation to former presidents of *Henry* the third, and they speak plainly that their intent was to strengthen the Kingdome against dangers from abroad; the words
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of the Historian are cleare, that Henry the third charged all that had 15 *libras terre* and upwards should undertake the Armes of a Knight *ut Anglia sicut Italia militia roboraretur*. And because he had threats from beyond Sea by the defection of the Gascoines, therefore he caused Writs to issue forth throughout the Kingdome that *secundam pristinam consuetudinem*, assessement of Armes should be *secundum facultates*; and in one of the Writs published by the Historian the expresse assessement of Hen. 3. formerly mentioned is particularly set down. Nor are these Armes thus assessed so light as men would pretend, for the Armes of the first ranke were the compleat Armes of a Knight, and their estates equall thereunto; for those 15 *libras terre* amounted unto 780 acres of Land, as the late publisher of Paris his History hath it; and is very nigh the reckoning of Henry Huntington, who (as hath been mentioned) layeth a Helmet and coate of Maile unto eight hides of Land, which according to Gervase of Tilburies account commeth to 800 acres, every Hide containing one hundred acres. These therefore were better then Hoblers. And the succeeding ranks found Armes also proportionable to their estates, as considerable as the times could finde for such as were of constant use, and might be supplied with other weapons as occasion served, and as they might be of most benefit for the service.

Furthermore whereas its said that the wisdom of the Parliament might be questioned if they intended no better provision against an enemy then against a thiefe or rogue, I should desire the consideration of those men, whether are those thieves and rogues in Troops or bodies and well armed, or are they a sort of scattered out-lawes lightly armed to flee away, when they have have gotten the prey? If they were in the former posture, I pray what difference in point of difficulty of suppressing between them and so many enemies? and if it was discretion in the Parliament to make this provision against the one, certainly these with the Knighthood of the Kingdome with as much discretion will be sufficient provision against the other. But if these be looked upon in the latter sence, I feare the discretion of the Parliament would have been much more questioned

M. Paris fo. 916

M. Paris fo. 864

Vid. post Ad-
versaria.
M. Paris.

Cap. penult.

tioned in arming all men that have any ability to suppress Thieves and Rogues, against which the ordinary watch and ward of the Kingdom was an ancient and approved remedy, and sufficient safeguard. And I would fain know of these men whither it be for the safety of *Edward* the first, or any other King to arme the whole body of the people, especially in times of jealousy for suppressing of Thieves and Robbers when as it may be done by a guard of known men in every County, with much more ease and lesse charge to the people.

Lastly, whereas its endeavoured to make this Statute but a temporary provision and taken up for the present condition of affaires when Thieves and Robbers went with great strength, and in multitudes. This might be I grant of some efficacy, if it had been *introductio novi juris*; but it being grounded upon a former custome, the ground of that custome (which was defence of the Kingdom) must be the warrant of the Law; otherwise the present inconvenience might be remedied by a present order, and needed not the help of a Law that should rest upon former custome, or provide for future generations. Nevertheless if all be granted, viz. that this Statute is but a present order, that the Armes therein are too slight to resist an enemy; and the end thereof was onely to enable the Kingdome against Thieves and Robbers; yet could not *Edward* the first pretend to have any power to asseſſe Armes at pleasure upon occasion of warre for the defence of the Kingdome; nor is there any president in story that countenanceth it, seeing *Henry* the third and *Henry* the second in their course used the rule *secundum facultates*, as had been formerly observed; and the rule foregoing tended onely to freemen and their Lands. Nor did King *John* disclaime the same, but pursued it (and yet if there be any president of prerogative in story which King *John* had not, that King will be looked upon as a King of wonderment.) I say King *John* pursued it when he was in the strength of his distemper; threatened by the Pope, provoked by the French King now ready in the field, vexed by his people, and himself scarce himselfe, summons to defend himselfe, themselves, and the Kingdome of England, all men that ought to have Armes,

M. Paris
 An. 1213.

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or may have Armes, and such as have no armes; and yet *arma habere possint*, let them also come *ad capiendum solidatas nostras*; and accordingly there came a vast number not onely of the Armed men, but of the unarmed multitude, who afterward were sent to their own home when victuals failed. Hitherto therefore King *John* not above three yeeres before his death held himselfe to the assessment to Armes onely of such as had Lands; and at this time of exigency others unarmed were summoned to take Armes from the King with their pay, or otherwise they must fight without weapons.

I am now come to the last generall point which concerneth the executive power of matters concerning the peace within this law, touching which the Statute inforceth this, that Constables in every Hundred and Franchise shall have the view of Armes, and shall present defaults against the Statute of Justices assigned, who shall certifie the same to the King in every Parliament, and the King shall provide remedy; whereby it seemeth manifest that hitherto no law or custome was made against any for default of Armes, but onely such as held by that tenure: and therefore they had a shift to cause them to sweare to maintaine Armes, and so might proceed upon defaults, as in case of perjury; and that the Parliament was still loath to set any certaine rule for penalty, and absolutely declined it, and left it under a generall *periculo incumbente*, which its likely men would rather eschew by obedience, then adventure upon out of a daring spirit, unlesse their case was very cleere within the mercy of common reason; and therefore such cases were left to speciall order of the Parliament rather then they would deliver such a rod as determining power was over into any uncertaine hand what ever. It is very true that by the opinion of some this also hath been controverted, as if all the executive power had been turned out of the Parliaments order into the directory of *Edward* the first, which thing reacheth farre; for then in order thereunto the whole Militia of the Kingdome must have been under his safe command: and whether it ever entred into the conceipt of that King I know not, but somewhat like thereunto is not obscurely urged to nourish and

and suggest such a kind of notion, and so derive it unto his successors upon the words of a Statute *de defensione portandi armorum* the English whereof I shall render out of the French, as followeth :

It belongeth to us (viz. Edw. 1.) and from us by our Royall Seignory to defend force of Armes, and all other force against our peace at all times that we shall please, and to punish according to the laws and usages of this Realm, such as shall oppose, and to this they (viz. Lords and Commons) are bound us to ayd as their good Lord, alwaies when need shall be.

Two things are concurrant with this, which is the body of the Statute (if such it be;) the one is the preface, or the occasion: and the second is the conclusion upon the whole body of the same. The preface first set down the inscription or direction of the Law; not to the people but to the Justices of his bench, and so its in nature of a Writ or Declaration sent unto his Judges. Then it sets down the occasion which was a debate between Edw. 1. and his Lords with a Treaty, which was had before certaine persons deputed thereto: and it was accorded, that at the next Parliament Order shall be taken by common consent of the King, the Prelates, Earles, and Barons, that in all Parliaments treaties and other assemblies which shall be had in the Kingdome of England for ever after, all men shall come thereto without force, and without Armes, well and peaceably; and thence it recites that the said meeting at Parliament was had, and that there the Prelates, Earles, Barons, and Comynalty being assembled to advise upon this matter; *nous eions dit* saith one copy, and *nous eions dit* saith another copy; so as whether this was the Declaration of the King unto the Parliament, or of the Parliament to the King is oneidoubt, and a principall one it is in such a case as this. Then the conclusion of all is that the King commandeth these things shall be read before the Justices in the bench, and there enrolled; and this is dated the 30. of October in the seventh yeere of his reigne, which was Ann. 1279. So as if it were the Declaration of the King, then it implieth as if it were not very well accepted of the Parliament; and therefore the King would have it

rest upon record in nature of a claime or *protestando* for saving the prerogative of the Crown. But if it were the Declaration of the Parliament the King held it so precious a flower, that fearing it should fade set it in a private Garden of his owne, that it might be more carefully nursed against the blast of time; as if the Parliament had not assented thereto, (or if they did) meant not to hold it forth to the world for future times to be a constant rule, but onely by way of concession, to ease themselves of the present difficulty, in making a Law against wearing of Armour in ordinary civill affaires, and so referred it to the Kings care to provide against imergent breach of the peace, as an expedient for the present inconveniences in affairs. And it will well suite with the posture of affaires then in course, for the Welsh warres were now intermitted, and a quiet of three yeeres ensued; in the middest of which Souldiers having liberty to doe nothing (and that is next to naught) but recreate themselves, used their wonted guise, as if they were not dressed that day that they were not armed; nor fit for counsell, unlesse (as their ancessers) with weapons in their hands, nor worthy of the presence of a King under other notion then as a Generall in the field, and themselves as Commanders that are never a *la mode*; but when all in Iron and Steele. I say to make a Law that must suddenly binde men from riding or being armed when no man thought himselfe safe otherwise was in effect to expose their bare necks to the next turne of the Sword of a King that they did not overmuch trust, and the lesse in regard he trusted not them. I doe not wonder therefore if the Parliament liked not the worke, but left it to the King to provide for the keeping off breaches of the peace, and promised there assistance therein.

Lastly, supposing all that is or can be supposed, *viz.* that the Parliament had given up the power of the Militia unto *Edward* the first, yet it was not to all intents, nor did it continue; for besides the Statute of Torniments, which sheweth plainly that the ordering of Armour was in the power of the Parliament, and which in all probabiltie was made after that law last before-mentioned; the Statute at *Vinton* made after this Law
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nigh six yeeres space ordereth the use of the Trained bands in maintaining the peace, and reserveth the penalties to themselves for any default committed against the said act. And therefore notwithstanding any thing that yet appeareth to me out of any Law or History, the chiefe moderatorship of warre and peace within the Realm of *England* resteth hitherto upon the Parliament next under God, and in the King no otherwise then in order to the publique, the rule whereof can be determined by no other Judge then that which can be intended to have no other respect then the publique good; and which is the abridgement of the large volume of the Kingdom.

A summary conclusion.

ANd thus have I brought the shape of English government (rude as it is) from the first off-spring of the Saxons through the rough waves of the Danish tempests, the rocks of Norman invasion, and the Quicksands of Arbitrary government under Popes and Kings to the Haven; much defaced it is I confesse by the rage of time, and yet retained the originall likenesse in proportion.

Kings first (about the Norman times) joyning with the Lords for their joynt interest above the ordinary pitch had mounted each other too high to be Lords over free men; Then by flattering of the free men into their designs hovered above them all; but not being able to maintaine their pitch so long as the Lords held together, stooped for a party amongst them and soon obtained their desire. For some Lords (more ambitious then others, and they againe more populer then them) seeke severall interests: And thus Kings (aided by their party to a Supremacy which they were never borne to; and it by them into a preheminance above their Peeres which neither law nor custome ever gave them) are of Moderators in the Councell of Lords, become moderators of those Councils;
and

Braet. lib. 2.
c. p. 16.

Mirror Just.
p 9.

Edw. 2.

Remonstr. Par-
liament. no-
vem. 1. 2.
An. 1642.

and so they obtained all that the Lords had, but no more. For though both they and the Lords abused their power over the free men by extortion and oppression as Lords over tenants; yet could they never prevail over them as free born subjects to gain their consent to give their right, or the law up to the Kings beck; but still that remained arbiter both of King and people, and the Parliament Supreme expounder and Judge both of it and them. Other argument hereof there will be little need, besides what hath formerly appeared, then what we finde in *Braet* who wrote in the time of Henry the third, to this effect: *God is superiour to the King, and the Law by which he is made King, and his Court, viz. the Earles and Barons: Earles (according to their name Comites) are the Kings associates, and he that hath an associate hath a master; and therefore if the King be unbridled (or which is all one) without Law, they ought to bridle him, unlesse they will be unbridled as the King, and then the Commons may cry Lo Jesus, &c.* This was the judgement of that famous Lawyer of the State of an English King in Henry the thirds time, I shall adde hereto a concurrent testimony of a Lawyer also in Edward the first time. *Although (saith he) the King ought to have no equall in the Land: yet because the King nor his Commissioners (in case where the King intrencheth upon the right of any of his Subjects) can be both Judge and party; the King by right ought to have companions to beare and determine in Parliament all Writs and plaints of wrongs done by the King, the Queen, or their children, and of those wrongs especially whereof otherwise common right cannot be had. Nor is this the opinion onely of Lawyers, but it is the Law it selfe unto which the Royall assent was added, and the same sealed with an Oath in the solempne stipulation made by Kings at their Coronation with the people then present in the name of the whole body: the summe whereof is wont to be propounded to the King in this manner, though in a different Language.*

1. *Will you grant and keep, and by your Oath confirm to the people of England the Laws and Customes to them granted by the ancient Kings of England your righteous and*

and godly predecessours : and especially to the Clergie and people by the glorious King St. Edward your predecessor?

The Kings answer: I doe them grant and promise.

2. Will you keep to God and the Church, and the Clergie, and the people peace and concord sincerely according to your power?

The Kings answer: I will doe it.

3. Doe you grant to hold and keep the Laws and rightfull Customes which the Comonalty of your Realm shall have chosen, and to maintaine and inforce them to the honour of God after your power?

The Kings Answer: I this doe grant and promise.

In few words the King promised to keep the lawes already made, the peace of his Kingdome, and the Laws to be agreed upon by the commonalty : the same in subsistence with that of Henry the first, William the Conquerour ; the Danish and Saxon Kings formerly had, and in the foregoing discourse observed: And thus is he led to the Throne in a Chaine of Gold, a serious memoriall of the Kings duty as he is a man, and a glorious ornament to him as a King. If then the King be under the law in case of direction, as by stipulation he is bound, if he be likewise under the Law in case of transgression to be judged by his Comites or Peeres. Hitherto certainly an English King is but *Primus inter omnes*, and not *supra totum*; and if at any time he skipped higher, he afterwards fell lower; for it was the lot of these times to have Lords that were bent to worke the people to regard their own liberties, in which the Lords had first wrapped up their own claimes. Thus comes the counsels of such as have been notoriously exorbitant to be scanned; and to bring these into frame, all runne out of frame; the Barons warres arise, and thrive according as interests doe

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concenter more or lesse; the issue is like that of a drawn battaile, wherein he that continueth last in the field is glad to be gone away, and so the Title is left to be tried upon the next advantage that shall arise.

Yet had Kings gotten one step forwards to their designe, which was that they now had to deale with a divided Baro-nage. It was the birth of ambition, and it was nourished by the same milke; for those that side with the King are become Magnificoes next to the Kings person, and the sole managers of all the great affaires of State concurrant with their own designes under-board. But the other Lords are in account rull, standing further off, and looking on at a distance, are laid away as superfluous: and as they themselves are out of the game of great men, so grow they mindlesse of their interest in the great affaires, yet of these there is diversity, for some sport themselves in their condition; others observe the irregular motions of those above, and watch their owne time.

This was the first advance of that society, which was afterwards called the Privy-Councell; being a company of choise men according to the Kings bent, unto whom the consideration of all the weighty affaires of the Kingdome is committed; but nothing can be concluded without the Kings *fiat*, which regularly should follow upon the premisses, according to the major vote; but more ordinarily suteth with that which best suteth with his pleasure. And now are Parliaments looked on as fatall, or at the best, but as heavy dull debates, and inconvenient both for speed and secrecy; which indeed are advantages for weake and unwarrantable counsels, but such as are well grounded upon truth, and strength of reason of State care not to behold the clearest noon-day, and prevaile neither by speed nor secrecy, but by the power of uncontrolled Reason, fetcht from truth it selfe. The grand Councell of Lords also are now no lesse burthensome: For though they were not able to prevaile against the private designes of an arbitrary Supremacy, yet doe they hinder the progresse, tell tales to the people, and blot the names of those that are of that aspiring humour; which once done, like that of *Sisiphus* they have no other end of there labour then their toile.

Thus

Thus perished that ancient and rightly honourable Grand Councell of Lords, having first layd aside the publique then lost unity, and lastly themselves; besides the extreame danger of the whole body. For the sence of State once contracted into a Privy councell is soon recontracted into a Cabinet councell, and last of all into a Favourite or two, which many times brings dammage to the Publique, and both themselves and Kings into extreame *precipices*; partly for want of maturity, but principally through the providence of God over-ruling irregular courses, to the hurt of such as walke in them.

Nor were the Clergy idle in this bustle of affaires, although not very well imployed; for it is not to be imagined but that these private prizes plaied between the Lords, Commons, and King, laid each other open to the ayme of a forraigne pretention, whiles they lay at their close guard one against another: and this made an Ecclesiasticall power to grow upon the Civil, like the Ivy upon the Oake from being servants to friends, and thence Lords of Lords, and Kings of Kings: By the first putting forth it might seem to be a Spirituall Kingdome, but in the bloosome which now is come to some lustre its evident to be nothing but a temporall Monarchy over the consciences of men; and so like Cuckows laying their egges in nests that are none of their own, they have their brood brought up at the publique charge. Neverthelesse, this their Monarchy was as yet beyond their reach; it was Prelacy that they laboured for, pretending to the Popes use; but in order to themselves. The cripple espied their halting, and made them soon tread after his pace; he is content they should be Prelates, without measure, within their severall Diocesses and Provinces, so as he may be the sole *Prelatissimo* beyond all comparison; and undoubtedly thus had been before these times destroyed the very principles of the Church-government of this Kingdome, but that two things prejudiced the worke: the one that the papalty was a forraigne power, and the other that as yet the Pope was entangled with the power of Councels, if he did not stoop thereunto. The first of these two was the most deadly Herbe in the Pottage, and made it so unfavoury that it could never

be digested in this Kingdome : For Kings looking upon this as an intrenchment upon their prerogative, and the people also as an intrenchment upon their liberties, both or one of them were ever upon the guard to keep out that which was without, and would be ruled neither by Law nor Councill. And therefore though both Kings and people yeelded much unto the importunity of these men, and gave them many priviledges whereby they became great; yet was their greatnesse dependant upon the law of the Land and vote of Parliament; and though they had the more power they neverthelesse were not one jot the more absolute, but still the law kept above their top; I deny not but they in their practice exceeded the rule often and lifted themselves above their ranke; yet it is as well to be granted that they could never make law to bind the Church-men, much lesse the Laity, but by conjunction of the grand councils both for Church and Common-wealth affaires; nor could they execute any Law in case that concerned the liberty or propriety of either, but in a Synodical way, or as deputed by the Parliament in that manner. And therefore I must conclude that in these times whereof we treat the principles of Church-government, so farre as warranted by law, were in their nature Presbyteriall; that is, both in making laws and executing them; Bishops and Archbishops were never trusted with the sole administration of them, but in and by consent of Synods in which the Clergy and Laity ought to have their joynt vote; and all power more or contrary hereto was at the best an usurpation coloured by practise, which was easily attained where there was a perpetuall moderatorship resting in the Bishop, and over all the Pope; the King, Lords, and Commons in the mean while being buried in pursuit of severall interests elsewhere.

To make all semblable, the free men met with the sad influence of these distempers, as wel from the King and Lords, as the Clergy. Kings to save their own stake from the Pope, remitted of that protection which they owed to their Subjects, and let in upon them a flood of oppressions and extortions from the Romish and English Clergy, and so like a little ship cast out a barrell

barrell for the Whale to peruse till it gets away : but this changed no right. The Lords by their partees shattered them a sunder and dismembered their body by intestine broiles. The Clergy more craftily making some of them free Deniins of the Roman See, and taking them into their protection whiles others of the free men at a distance were expoied as a prey to the continuall assaults of those devouring times : all these conspired together to deface and destroy that ancient and goodly bond of brotherhood, the Law of Decenners, by which the free men formerly holden together like Cement in a strong wall, are now left like a heape of loose stones, or so many single men scarcely escaping with their skinne of liberties, and those invaded by many projects and shifts in government of State affaires. So must I leave them untill some happy hand shall worke their repaire both for time and manner, as it shall please *that great and wise Master builder of the World.*

F I N I S.



The Table.

| | | | |
|---|----------|---|-------------|
| A Bbats | page 229 | Aides after the Norman times | |
| Abbeys quarter | p.242 | | 201,278,285 |
| Not taxed or visited | | Alderman | p.53 |
| from forraine parts | p.244 | Alienations licence | p.183,274 |
| Vacancies | ibid. | Allegiance according to the Sax- ons | p.86 |
| Purveyance | ibid. | The Normans | p.151 |
| Aberemurder amongst the Sax ons | p.99 | Amercements | p.250,262 |
| Accolites amongst the Saxons | p.28 | Apostacy, punished by the Saxons | p.39 |
| Accusation, witnesses amongst the Saxons | p.150 | after | p.194 |
| Action amongst the Saxons | p.87 | Appeales amongst the Saxons | p.86 |
| Acquittale vide Knightservice | | the Normans | p.151 |
| Administraction, vide Intestate | | after | p.274 |
| Adultery amongst the Saxons | p.42 | Appeales to Rome | p.176 |
| amongst the Normans | p.141 | seiled | p.179 |
| after | p.234 | to Ecclesiastical Courts | p.179 |
| Advoufions cognisance | p.178 | Archbishops, vide Metropoli- tant. | |
| Aedeling | p.53 | Arraies | p.305, &c. |
| Age, vide Infancy | | Armes assessement | p.206 |
| | | vide Arraies. | |
| | | Austin the Monke, his comming and | |

TABLE.

and his actions

p.17,&c.

Burgage amongst the Saxons

B.

Burghbote

p.82

ibid.

Burglary punished by the Saxons

p.101

BAile 195,&c.269,&c.290

Bailes, vide Bridges.

Baron, vide Court.

Bargaine and faile of goods amongst the Saxons

p.107

the Normans

p.143,

Barons warres

p.221,&c.

Bastardy amongst the Saxons

p.42

Battaile triall amongst the Saxons

p.90

Batteries punished by the Saxons

p.100,193

Bigamists

p.247

Bishops amongst the Saxons

p.25

vide Prelacy : amongst the Normans; their power increased

p.123,&c.

vide elections, their oath to the Pope

p.184

Blasphemy punished by the Saxons

p.39,98

amongst the Normans

p.138

Bloodshed, vide Manslaughter.

Bridges

p.263

Britons, their Religion and government

1.&c.18

conversion

p.3

instructed in learning

p.6

a Province

ibid.

the last that submitted to the papalty, and the first that shook it off

p.20

C.

Cannon-law

p.121

vide Prelacy.

Carriages

p.265,267

Castles, their use

p.117,

265,&c.

abuse

p.166

occasion of the first civil wars

p.209

Castle guard, vide Mag. cart.

p.267

de Cautione admittenda

p.182

Chancery

p.285

Chancemedly

p.287

Church, maintainance by the

Saxons

p.29,&c.

Franchise

p.71

Alienation

p.183

Reparation

p.235

Church-men, Action

p.230

231

discharged from Torns

p.230

purveyance

p.23,267

Their complaints

p.227,236

Priviledged from distresse

p.242

Ciri-

TABLE.

Cirickſceate amongſt the Sax-
ons p.30

Normans p.139

Vide firſt fruits.

Circuits p.192

Citation p.182,242

Clerks triall p.185,231,243

Killers of Clerks p.185

Comites ex plebe p.55

Common pleas ſealed p.260

Commutation, *vid*: Arriculi
Cleri.

Compurgators amongſt the
Saxons p.89

Confefſion ſacred p.242

Conſtitutions at Clarendon
p.178

de Conſimili caſu p.285

Conveyance, *vide* Deeds.

Copy hold, *vide* Mannor.

Coroners amongſt the Saxons
p.66,286

Corporations p.77,&c.125

Coverfew p.163

Councels generall, *vide* Synods.

Councels of Lords amongſt the
Saxons p.54

vide Lords.

Counties, Courts amongſt the
Saxons p.65

Normans p.131

Afer p.275,276,285

Court Baron amongſt the Sax-
ons p.78

Crown pleas *Mag.cart.* p.264

Curteſie of England in the
Saxons time p.105

Cuſtodes pagani amongſt the
Saxons p.55

D.

D Aneguelte p.164

Released p.189

Darrain. preſentment *Mag.*
Cart. p.262

Deacons p.28

Deaneries amongſt the Saxons
p.36

Debt to the King, ſatisfaction
p.257

Debt to the King, *Mag.cart.*

Decenners amongſt the Saxons
p.70

Normans p.134

Deeds among the Saxons p.107

Defamation p.235,240

Departure beyond Sea without
licence p.180

Diocesses amongſt the Saxons
p.36

Diſtreſſe in the Normans time
p.142

Mag.cart. 258, &c.
vide County court.

Diſſeiſin, *vide* Rediſſeiſin &
Noveldiſſeiſin.

Dower in the Saxon time p.103

Norman times p.146,256

E

E Ccleſiaſticall cogniſance
and power p.176,&c.
129,204
Vide

TABLE.

| | |
|---|---|
| <i>Vide Stat. Circumspecte agatis & Articuli cleri.</i> | <i>and forfeiture</i> p.151, 195 |
| Ederbrece amongst the Saxons p.101 | 267 |
| Edw. the first p.214 | Concelement p.289 |
| Edw. the second p.218 | Defamed ibid. |
| Elections p.121, 180, 232, 243 | Feorme or Farme amongst the Saxons p.75 |
| Elegit amongst the Saxons p.95 | Fightwit amongst the Saxons p.100 |
| Englithire, a Saxon Law p.100 | Fine, by the Normans p.150, 280, &c. |
| Errour, vide Appales. | Folkmete, <i>Vide County court.</i> |
| Escheates p.268 | Foolles and ideots amongst the Normans. p.149 |
| <i>Vide Forfeiture, Felony.</i> | After p.280 |
| Escuage, <i>Mag. Carta</i> p.276, &c. | Forraine counceils p.209, 212 |
| Excommunication in the Saxons time p.95 | 219 |
| Normans p.128 | Fornication, <i>vide Adultery.</i> |
| After the Normans time 181 | Forrells amongst the Saxons p.82 |
| Excommunicato deliberando p.241 | Franchises p.68 |
| Excommunicato capiendo p.242, 291 | Frankpledge amongst the Saxons p.78 |
| Execution in the Saxon time p.94 | <i>Vide view.</i> |
| Executors <i>Mag. carta.</i> | Freemen of the Saxons p.55 |
| Exorsists p.28 | Normans p.135 |
| | After p.188, 272 |
| | Frithbrech amongst the Saxons p.100 |
| | Fugam fecit p.85 |
| | Fugitives p.268 |

F.

FAires in the Norman time p.143
 Fauxonry p.192, 195
 Feastdaies, Norman law p.139
 Felonies and Felons punishment

G

GAvellkind amongst the Saxons p.106
 Normans p.160
 Glebe amongst the Saxon Goods p.32

TABLE.

| | | |
|-------------------------------------|--------------------------------------|-------|
| Goods found, <i>Saxon Law</i> | Imprisonment <i>Saxon</i> | p.100 |
| <i>Norman</i> | <i>Norman</i> | p.151 |
| <i>Sale</i> | Incest <i>punished by the Saxons</i> | p.101 |
| Grithbrech, <i>vide Frithbrech.</i> | Indictment <i>Saxon law</i> | p.85 |
| | Infancy <i>amongst the Saxons</i> | p.88 |

H

| | | | |
|---|-----------|---|-----------|
| H Abendum, <i>Saxon</i> | p.107 | After. | p.198 |
| Hamsockne, <i>Saxon</i> | p.101 | Infangtheoff, <i>Saxon</i> | p.74 |
| Hereſie <i>punished by the Saxons</i> | p.39 | Inheritance <i>Saxons</i> | p.102 |
| <i>Normans</i> | p.138 | <i>Normans</i> | p.160 |
| <i>After</i> | p.193 | <i>After</i> | p.196,&c. |
| Haubergettum, <i>Haubertum,</i> | | Inquest, <i>Saxon</i> | p.91 |
| Halbargellum <i>what it is</i> | p.309 | Interdict <i>in the Saxon time</i> | p.38 |
| | p.53 | <i>After</i> | p.182 |
| Heretock, <i>Saxon</i> | p.119 | Intent <i>punished by the Normans</i> | p.151 |
| Henry the first | p.167 | Intestate <i>Saxon law</i> | p.109 |
| Henry the second | p.207,&c. | <i>Norman</i> | p.143 |
| Henry the third | p.210 | <i>Afterward</i> 232,&c.264,&c. | p.170 |
| <i>Shifts for money</i> | p.212 | John | |
| <i>Forraine counsels</i> | | Judgement, <i>vide execution.</i> | |
| <i>Teelds up his interest in the militia to the Lords</i> | ibid.&c. | Judges, <i>vide Justice.</i> | |
| Heordpeny, <i>vide Peterpence.</i> | | Judicatory | 189,&c. |
| Highwaies <i>priviledge</i> | p.305 | Jury <i>grand & petit amongst the Saxons</i> | p.91 |
| Hundred and the Court <i>Saxon</i> | p.68 | Justice and their Courts <i>amongst the Saxons</i> | p.84 |
| <i>Norman</i> | p.133 | <i>Chiefe Justice</i> | p.191 |
| Hundred, <i>Setena Saxon</i> | p.68 | Judges or Justices <i>itinerant after the Normans</i> | p.192,199 |

I

| | |
|--|-------|
| I dolatry <i>punished by the Saxons</i> | p.97 |
| <i>Normans</i> | p.138 |
| <i>Vide Blasphemy.</i> | |

K

| | |
|---|----|
| K ings <i>amongst the Saxons;</i> | |
| <i>election, continuance, covenant, maintenance, power,</i> | |
| X x | in |

TABLE.

| | |
|--|---|
| <i>in Church-matters</i> p.46, &c. | <i>Livery and feign amongst the Saxons</i> p.108 |
| 56 | London p.257 |
| <i>Amongst the Normans: election</i> 113, &c. | <i>Lords day maintained by the Saxons</i> p.98 |
| <i>Covenant</i> 116, &c. | <i>By the Normans at plea of the Crown</i> p.139 |
| <i>Power in Church matters</i> p.123, &c. | <i>Lords, their counsels amongst the Saxons</i> p.62, 84 |
| <i>In the times of Steven, Henry the second, Richard the first, and John: Election</i> p.165 | <i>From the Conquerours time till Henry the third</i> p.174 |
| <i>Power in Church matters</i> p.176, &c. | <i>Lorica, what it is</i> p.309 |
| <i>In the times of Henry the third, Edward the first, and Edward the second. Succession</i> p.208, &c. | <i>Lucius</i> p.9, &c. |
| <i>Power in Ecclesiastical matters</i> p.225, &c. 233 | <i>Luminaries amongst the Saxons</i> p.31 |
| <i>In Civill affaires</i> 277, &c. 317, &c. | <i>Lunacy, vide foolcs.</i> |
| <i>Knight-service amongst the Saxons</i> p.76 | M |
| <i>Marriage</i> p.146, 202, 255 | <i>Magna carta</i> p.172 |
| <i>Acquittall</i> p.149 | <i>Renewed with the curse</i> p.210 |
| <i>Widdows</i> p.256 | <i>Stat. &c.</i> p.253 |
| L | <i>Cap. 35.</i> p.244 |
| <i>Language endeavoured to be changed by the Normans</i> p.161 | <i>Cap. 37.</i> p.245 |
| <i>Lathlight amongst the Saxons</i> p.99 | <i>Mainpernours by the Saxons</i> p.85, 87 |
| <i>Lecturers amongst the Saxons</i> p.28 | <i>By the Normans</i> p.151 |
| <i>Leet amongst the Saxons</i> p.78 | <i>Maimes punished by the Saxons</i> p.100 |
| <i>Legierwit amongst the Saxons</i> p.100 | <i>Manbota amongst the Saxons</i> p.99 |
| | <i>Mannors amongst the Saxons</i> p.75 |
| | <i>Normans</i> p.134 |
| | <i>Manslaughter punished by the Saxons</i> p.99 |
| | <i>Normans</i> |

TABLE.

| | |
|---|------------|
| Normans | p.140 |
| After | p.195 |
| Manumission | p.137. |
| Marriage portion, vide Dower. | |
| Marriage, vide Knight service. | |
| Marchants <i>Magna carta</i> | p.272 |
| Marches amongst the Saxons | |
| | p.72 |
| Normans | p.131 |
| Markets amongst the Saxons | |
| | p.80 |
| Normans | p.143 |
| Vide Townships. | |
| Marshals Court | p.285 |
| Matrimoniall causes amongst the Saxons | p.41 |
| Medietas linguæ amongst the Saxons | p.92 |
| Metropolitan amongst the Saxons | p.23 |
| MickleMOTE amongst the Saxons | |
| | p.57 |
| The Primacy of Canterbury settled there | p.36 |
| Mills tithed | p.240 |
| Militia amongst the Saxons | |
| | p.63 |
| The Normans | p.152 |
| During the Kings next ensuing | p.205 |
| During Henry 3. Edward 1. Edward 2 | p.294 |
| Mint amongst the Saxons. | |
| Normans | p.137 |
| Monastery admission | p.183 |
| Mortdancer | p.198, 261 |
| Mortmaine | p.245 |

Mortuary amongst the Saxons

N

p.32

Newes scandalous p.292

Nightwatches by the Normans

p.141

After

p.304

Nobility amongst the Saxons

p.53

From the Normans time p.

172

From King Johns time p.

221

Normans, their title, &c. p.113,

&c.

Not conquest

p.155

Novell disseisin p.199, 261

O

Oblations cognisance p.235

Odio & Atia p.269, &c.

Officers power greater then kings

p.173

Ordeale amongst the Saxons

p.89

Ordinaries intestate

p.232

Ontfangtheoff amongst the Saxons

p.74

Ostiares amongst the Saxons p.

28

Othes

p.246, 271

P

Palatine county amongst the Saxons

p.73

Xx2

Pari-

TABLE.

| | | | |
|--------------------------------------|--------------|---------------------------------------|----------------|
| Parishes amongst the Saxons | p.35 | Protectour | p.209 |
| Parliaments | p.120,278 | Provinces amongst the Saxons | p.35 |
| Parks trespasses | p.292 | Purveyance | p.244,265, &c. |
| Passage | p.272 | Q | |
| Peace amongst the Saxons | p.100 | Quare Clausum fregit, Sax- | |
| <i>The Normans</i> | p.140 | <i>on</i> | p.101 |
| <i>After</i> | p.300 | Quare excommunicavit | p.227 |
| Penall Laws, Saxons | p.96 | Quare non admisit | ibid. |
| <i>Normans</i> | p.138 | Quarentine | p.256,282 |
| <i>After in the time of Henry 2.</i> | p.193 | Quo warranto | p.244 |
| <i>After</i> | p.286 | R | |
| Perjury punished by the Saxons | p.40,101 | R Ansome | |
| Peeres amongst the Saxons | p.93 | R Rape, Norman | |
| Peter pence amongst the Saxons | p.32 | <i>After</i> | p.195, &c. 288 |
| <i>The Normans</i> | p.139 | Reasonable part | 257,264 |
| Pledges | p.150 | <i>Vide Dower.</i> | |
| Plough almes, Saxons | p.32 | Redemption, vide Ransome. | |
| Popes power | p.19,177,184 | Redesseisin | p.292 |
| <i>Oppressions of the Clergie</i> | p.225 | Reliefe, Norman | p.145 |
| Prelacy in England not till Con- | | <i>After</i> | p.201 |
| stantines time 11. came from | | Religious houses, vide Abbeys. | |
| Rome by Austin | p.21, &c. | Replevy, Norman | p.142 |
| Suddenly grown | p.44 | | 259 |
| Præcipe Mag. carta | p.268 | Richard the first | p.169 |
| Priors, vide Abbats. | | Romans entry | p.5 |
| Presbyters amongst the Saxons | p.27 | <i>The Papalty, with seven de-</i> | |
| Presentment amongst the Sax- | | <i>grees of their Church Officers</i> | p.29 |
| ons | p.86 | <i>Seven sorts of Church mainte-</i> | |
| Priority, vide Tenure. | | <i>nance</i> | p.35 |
| Prohibitions | p.228,233 | Romescot Romesfeogh, vide | |
| | | <i>Heordpenny.</i> | |
| | | Robbery | |

TABLE.

| | | |
|--------------------------------------|-------------------------|-------------|
| Robbery punished by Saxons | Cap. 17. | p. 282 |
| By Normans | Cap. 19. | p. 262 |
| After p. 193, 195, 287, 304 | Cap. 20. | p. 261 |
| | Cap. 21. | p. 259 |
| | Cap. 22. | p. 260 |
| S | Cap. 25. | p. 287, 302 |
| | Cap. 29. | p. 229 |
| Sabbath day, Saxon law | Westm. 1. cap. 1, 2, 5. | p. 231, &c. |
| Sacrilege, Saxon law | Cap. 3. | p. 289, 302 |
| Sanctuary | Cap. 4. | p. 281 |
| Saxons in England mingled | Cap. 6. | p. 263 |
| | Cap. 9. | p. 289 |
| Seale, vide Deeds | Cap. 10. | p. 286 |
| Sheriffs, Saxon | Cap. 11. | p. 270 |
| Extortion | Cap. 12. | p. 289 |
| Symony punished by the Saxons | Cap. 13. | p. 288 |
| | Cap. 14. | p. 275 |
| Sorcery, vide Witchery. | Cap. 15. | p. 290 |
| Soulshot Saxon | Cap. 16. | p. 260 |
| Socage Saxon | Cap. 20. | p. 292 |
| Steven his government | Cap. 22. | p. 256 |
| Stat. Magna carta, vide Magna carta. | Cap. 23. | p. 286 |
| | Cap. 32. | p. 268 |
| Merton, cap. 1, 2, 6, 7 | Cap. 33. | p. 275 |
| Cap. 1. | Cap. 34. | p. 292 |
| Cap. 3. | Cap. 36. | p. 285 |
| Cap. 9. | Cap. 51. | p. 261 |
| Cap. 10. | Bigamy | p. 247, &c. |
| Cap. 11. | Glocest cap. 1. | p. 262 |
| Marlbridge, cap. 1, 2, 3. | Cap. 5. | p. 255 |
| Cap. 4. | Cap. 6. | p. 261 |
| Cap. 5. | Cap. 8. | p. 285, 302 |
| Cap. 8. | Cap. 9. | p. 270 |
| Cap. 9. | De Religiosis | p. 245 |
| Cap. 10. | Westm. 2. cap. 13. | p. 275 |
| Cap. 15. | Cap. 16. | p. 256 |
| Cap. 16. | Cap. 19. | p. 232 |
| | Cap. | |

TABLE.

| | | | |
|----------------------------|------------------|------------------------------------|------------------|
| <i>Cap.</i> 24. | p. 285 | Suite of Court | p. 202 |
| <i>Cap.</i> 26. | p. 292 | Vide <i>Manner.</i> | |
| <i>Cap.</i> 29. | p. 270, 285 | Synods, Briton | p. 11 |
| <i>Cap.</i> 30. | p. 262 | Saxon | p. 37 |
| <i>Cap.</i> 33. | p. 245 | Disadvantageous to Prelacy | |
| <i>Cap.</i> 34. | p. 288 | | p. 45 |
| Winton | p. 302, &c. | Norman | p. 127 |
| Circumspecte agatis | p. 233, &c. | Without the Laity | p. 187 |
| Quia emptores | p. 274 | Power | p. 248, &c. |
| De Judaismo | p. 273 | | |
| Quo warranto | p. 244 | T | |
| De vasto | p. 255 | | |
| De consultatione habenda | p. 238 | T Aile; Saxon law | p. 105 |
| De wardis | p. 254 | Taxes | p. 278 |
| Artic. super Cart. cap. 2. | p. 266 | Vide Free men. | |
| <i>Cap.</i> 3. | p. 285 | Tenures, vide <i>Manner.</i> | |
| <i>Cap.</i> 9. | p. 286 | Normans changed them not | p. 161 |
| <i>Cap.</i> 12. | p. 260 | Tenures by several Lords, priority | p. 200 |
| <i>Cap.</i> 13, 14. | p. 276 | By Escheats | p. 273 |
| <i>Cap.</i> 15. | p. 285 | Terme, Saxon | p. 110 |
| <i>Cap.</i> 18. | p. 255 | Testament, Saxon | p. 108 |
| Conjunct feoffat. | p. 262 | After | p. 202, &c. |
| Amortizand terris | p. 246 | Thefts, cognisance | p. 193, 195 |
| Afportat bonis Relig. | p. 244 | Tithes, originall | p. 30 |
| Demilitibus | p. 294 | Cognisance | p. 43 |
| Artic. cleri | p. 219, 238 | Normans | p. 139, 778, 238 |
| Vicecomit | p. 219, 276, 286 | | 240 |
| De p'fcis bonis cleri | p. 219, | Torne, Saxon | p. 67, 275 |
| | 244 | Torture amongst the Saxons | p. 88 |
| Prerog. reg. | p. 220 | Townships and their Courts, | |
| <i>Cap.</i> 3, 13. | p. 254 | Saxon | p. 81 |
| <i>Cap.</i> 7. | p. 274 | Normans | p. 134 |
| <i>Cap.</i> 9. | p. 280 | Treason punished by Saxons | p. 98 |
| <i>Cap.</i> 11. | p. 281 | After | |
| <i>Cap.</i> 14, 16. | p. 268 | | |
| Subdeacons | p. 28 | | |

TABLE.

| | | | |
|--|-----------------------|-------------------------------------|-------------|
| <i>After</i> | p. 194 | Warranty, <i>Saxon</i> | p. 107 |
| Trover of goods | p. 143 | Weares | p. 268 |
| Trotheplight | p. 179 | Wera, wergilda, <i>Saxon</i> | p. 99 |
| V | | Weights and measures, <i>Saxons</i> | p. 28 |
| Vacancies of Churches | p. 179, &c. 185 | <i>Normans</i> | p. 142, 269 |
| Vacation, <i>vide Terme.</i> | | Widdows, <i>vide Socage and</i> | |
| View of pledges, <i>Saxon</i> | p. 78 | <i>Knightservice.</i> | |
| <i>Norman</i> | p. 134 | William the first | p. 113, &c. |
| <i>After</i> | p. 263, 275 | William Rufus | p. 118 |
| Villains, <i>Saxon</i> | p. 56 | Wife, <i>Saxon</i> | p. 98 |
| <i>Normans</i> | p. 137 | Will, <i>vide Testament.</i> | |
| Violence done to Clerks | p. 235 | Witnesses, <i>deeds, Saxon</i> | p. 108 |
| Use in deeds of conveyance, <i>Saxon</i> | | Witchery | p. 40 |
| | p. 107 | <i>Punished by Saxons</i> | p. 97 |
| Usury | p. 273 | Wita, <i>Saxon</i> | p. 99 |
| W | | Worship, <i>Saxon, cognisance</i> | p. 39 |
| Wardship | p. 148, 202, 254, 270 | Wrecks | p. 281 |

FINIS

